88- 1806

No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

LAND AIR DELIVERY, INC., - - - Petitioner

versus

NATIONAL LABOR RELATIONS BOARD, - - - - - - - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether replacement of striking employees with contractors is the equivalent of replacement of the striking employees with "scab" employees in an economic strike, and is therefore not unlawful under the National Labor Relations Act.

2. Whether the National Labor Relations Board violates an employer's Due Process right to have both notice, and an opportunity to respond, by finding the six-month limitation period of Section (10)(b) of the Act to have been tolled because of "intentional" or "fraudulent" concealment, when there is no allegation of, evidence of, or argument concerning a claim of intentional or fraudulent concealment.

> [Note: Petitioner states Question 3 not as a reason for grant of certiorari, but solely to preserve the right to argue the issue should certiorari be granted.]

3. Whether it is error to hold that a claim under Section 8(a)(5) of the Act is not barred by the applicable six-month limitation period when the Section 8(a)(5) claim was raised by an amended charge filed more than eleven months after the conduct, and the original charge raised only Section 8(a)(3) claims and was itself filed more than six months after the Section 8(a)(5) conduct was found to have occurred.

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the petitioner Land Air Delivery Inc., and the respondent National Labor Relations Board. Appearing in proceedings before the National Labor Relations Board below, although not a party therein, was Local 41, International Brotherhood Teamsters; Local 41 did not appear or take part in any way in the proceedings in the United States Court of Appeals for the District of Columbia below.

Pursuant to Rule 28.1 of the rules of this Court, petitioner states that the co-owners of the petitioner (a corporation) are also the equal and only stockholders in the following corporations: Bowling Green Beer Distributors, Inc.; Land Air Express, Inc.; TDD, Inc.; Cargo Express, Inc.; and Quality Sanitation, Inc. All of the foregoing corporations are incorporated in the state of Kentucky. The co-owners of petitioner are Joseph P. Schneller, Sr. and Marilyn L. Schneller, his wife; Joseph P. Schneller, Sr. is the sole stockholder of Interstate Express Systems, Inc., a Kansas corporation.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

LIST OF PARTIES and RULE 28.1 LIST ii

TABLE OF AUTHORITIES ..... iv- v

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 3- 4

STATEMENT OF THE CASE 4–12

Introduction 4- 5

The Petitioner's Business Practice of Using Contractors 5- 6

The Labor Dispute and Consequent Strike 6

Use of Contractor Replacements During Strike 7

Termination of the Strike—Finding of No "Unfair Labor Practice" Strike 8

The Charge in the Case at Bar 8–10

The Decision of the NLRB 10–11

The Decision of the District of Columbia Court ... 11–12

REASONS FOR GRANTING THE WRIT 12–29

I. This Matter Raises an Issue of Importance and the Decision Below Conflicts with a Decision of the Ninth Circuit 12–22

The Importance of the Issue 12–19

Conflict with Another Appellate Court 19–22

II. The Question of Notice and Opportunity to Respond to an Unpleaded and Unproved Finding of Intentional or Fraudulent Concealment Presents an Important Constitutional Issue 22–29

CONCLUSION 29

(Appendix presented separately, due to voluminous nature of decisions below.)

TABLE OF AUTHORITIES

PAGE

American Cyanamid Co. v. *NLRB*, 592 F. 2d 356 (7th Cir. 1979) 21

Belknap, Inc. v. *Hale*, 463 U.S. 491 (1983) 13

Buckley Broadcasting Corporation of California, 284 NLRB No. 113 (1987) 15

Charlotte Telecasters v. *Jefferson Pilot Corp.*, 546 F. 2d 570 (4th Cir. 1976) 26

Equitable Gas Co. v. *NLRB*, 637 F. 2d 980 (3rd Cir. 1981) 17

Fibreboard Corp. v. *NLRB*, 379 U.S. 203 (1964) ..13, 15, 22

Glus v. *Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959) 26

Hawaii Meat Company v. *NLRB*, 321 F. 2d 397 (9th Cir. 1963) 11, 19

Holmberg v. *Armbrecht*, 327 U.S. 392 (1945) 25

ILGWU v. *NLRB*, 463 F. 2d 907 (D.C. Cir. 1972) 28

Intern. Ass'n. of Bridge v. *NLRB*, 792 F. 2d 241 (D.C. Cir. 1986) 28

J.C. Penney v. *NLRB*, 384 F. 2d 479 (10th Cir. 1967). 27

Local Lodge No. 1424, IAM v. *NLRB*, 362 U.S. 411 (1960) 24

NLRB v. *Blake Construction Co., Inc.*, 663 F. 2d 272 (D.C. Cir. 1981) 27

NLRB v. *Brown*, 380 U.S. 278 (1965) 13, 16

NLRB v. *Don Burgess Construction Corporation*, 596 F. 2d 378 (9th Cir. 1979), cert. den. 444 U.S. 940 (1979) 26

NLRB v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967) .13, 14

NLRB v. *Insurance Agents' International*, 361 U.S. 477 (1960) 13, 16, 18

NLRB v. *King Radio Corporation*, 416 F. 2d 569 (10th Cir. 1969), cert. den. 397 U.S. 1007 (1970) 17

NLRB v. *Mackay Radio & T. Co.*, 304 U.S. 333 (1938) .13, 19

PAGE

NLRB v. *Quality C.A.T.V.*, 824 F. 2d 542 (7th Cir. 1987) 27

NLRB v. *Tamper, Inc.*, 522 F. 2d 781 (4th Cir. 1975). 27

Road Sprinklers Fitters Local Union No. 669 v. *NLRB*, 778 F. 2d 8 (D.C. Cir. 1985) 27–28

Soule Glass and Glazing Co. v. *NLRB*, 652 F. 2d 1055 (1st Cir. 1981) 27

TWA v. *Independent Fed. of Flight Attendants*, — U.S. —, 57 LW 4283 (1989) 13

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

LAND AIR DELIVERY, INC., ... *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, . . . *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Land Air Delivery, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, initially issued and entered on December 2, 1988, a Petition for rehearing having subsequently been denied on March 2, 1989, and the opinion having been amended by order of March 29, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia is reported at 862 F. 2d 354, and is reprinted, along with orders denying rehearing and amending, in the appendix, which is separately presently.

The decision of the National Labor Relations Board, affirming the decision of its Administrative Law Judge, is reported as 286 NLRB No. 107, and is reprinted, along with the decision of the Administrative Law Judge, in the separate appendix hereto.

JURISDICTION

This matter began with the issuance of an administrative complaint of an unfair practice under Section 10(b) of the National Labor Relations Act (29 USC § 160(b)).

Following the decision of the NLRB, and pursuant to Section 10(f) of the National Labor Relations Act (29 USC § 160(f)), the petitioner filed with the United States Court of Appeals for the District of Columbia Circuit a petition for review of the order of the NLRB, and the respondent thereafter timely filed with the same court a cross petition for enforcement of its decision, pursuant to Section 10(e) of the Act (29 USC § 160(e)). The District of Columbia Circuit issued its opinion on December 2, 1988, denying petitioner's petition for review (but inadvertently omitting to grant the respondent's cross petition for enforcement). The petitioner timely petitioned for rehearing, with a suggestion that rehearing be held en banc, and on March 2, 1989, the District of Columbia Circuit denied the petition for rehearing. By order dated March 29, 1989, and pursuant to motion of the respondent, the District of Columbia Circuit corrected its original opinion to include language granting the respondent's cross petition for enforcement.

Jurisdiction of this court to review the judgment of the District of Columbia Circuit is invoked under 28 USC 1254, as referenced in 29 USC § 160(e).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

29 USC § 158(a) (1), (3) and (5). Unfair labor practices by employer.

It shall be an unfair labor practice for an employer—

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization [;]

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of 159(a) of this title.

29 USC § 160(b). Complaint and notice of hearing.

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board or any agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof on the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. . . .

Amendment V, United States Constitution.
Due Proces. of Law (inter alia)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Introduction

The essential facts in this matter may be summarized thus:

During an economic strike the employer (petitioner herein) replaced the striking truck-driver employees with contractor drivers.

Upon the end of the strike, the petitioner declined to reinstate the employee drivers because there was no work available as the contractor drivers were and had been performing all available work.

The strike was motivated in part by a dispute over whether the collective bargaining agreement permitted the petitioner to use contract drivers (as it had done for many years); however, during the strike, and before all of the strikers had been replaced by contract drivers, the collec-

tive bargaining agreement expired, the petitioner having given due notice of intent to terminate the agreement.

The National Labor Relations Board, in an order enforced by the District of Columbia Circuit, found the petitioner guilty of (1) refusing to bargain with the union in connection with the contracting which occurred during the strike, and (2) discriminating against the employees for striking, by failing to reinstate them at the strike's end. The refusal-to-bargain charge was not filed until well after the six-month limitation period had expired, but the ALJ found that the limitation period was tolled because of "fraudulent concealment" of use of contractor drivers, even though such concealment was not alleged, was not the subject of proof, and was not argued by the General Counsel.

Following are the salient details.

The Petitioner's Business and Practice of Using Contractors.

The petitioner was a company engaged in using small trucks to pick up and deliver packages for overnight express air carriers. It was an air freight motor carrier performing the ground portion of air shipments to and from the airport located in Kansas City, Missouri. Petitioner's major customer was Emery Air Freight, and petitioner operated out of a loading dock owned by Emery and located near the airport.

Petitioner utilized truck drivers of two types: there were thirteen employee drivers; there was also a varying number of drivers who were not employees, but were contractors. Both employee drivers and contract drivers wore the same uniforms.

The employee drivers constituted a collective bargaining unit of which Teamsters Local 41 was the certified representative under the National Labor Relations Act. Local 41 was first certified as a representative of that bargaining unit in 1973.

In 1975, the NLRB issued a "unit clarification" decision acknowledging that petitioner utilized both the employee drivers who were the members of the bargaining unit, and contractor drivers who, the Board clarified, were not members of the collective bargaining unit.

The Labor Dispute and Consequent Strike.

As of the fall of 1984, there had existed for some two years a dispute between petitioner and Local 41 over whether or not the then-existing collective bargaining agreement between them prohibited petitioner from using contractor drivers. There were grievances under the contract concerning this dispute.

On November 13, 1984, the union began a economic strike against Land Air, motivated in part by the dispute over whether the petitioner could use contractor drivers under the terms of the collective bargaining agreement.

The union began the strike at 6:00 a.m. on October 13, 1984, without prior notice or warning of any kind to petitioner. Because the nature of petitioner's business involved delivery and pick-up of express packages, continuing service was essential. Petitioner's major customer, Emery, imposed strict deadlines for pick-up and delivery of its freight, which was guaranteed to occur no later than overnight. The users of the air freight service paid a premium to have their documents and packages delivered as fast as possible.

Use of Contractor Replacements During the Strike.

As the strike wore on (it lasted into spring of 1985), petitioner increasingly utilized contractor replacements, as opposed to employee replacements. By the time the striking employees made an unconditional offer to return to work and end their strike on April 9, 1985, all of the replacement drivers were contractors rather than employees. The factual finding below was that the shift over to exclusive use of contractor drivers occurred in the period February 20 to March 1, 1985.

A primary reason for the petitioner's ultimate use of contractors, as opposed to employee replacements, was the widespread vandalism and violence engaged in by the striking employees. This pattern of conduct was found to exist by the Administrative Law Judge in his decision affirmed by the NLRB, and resulted in the Board's affirmation of the discharge of five of the thirteen bargaining unit employees. The pattern of vandalism and violence caused an immediate increase in petitioner's expenses due to the need to provide both security for and repair of vehicles and property. As petitioner began to utilize contractor drivers, the need for security and cost of repair was cut, because the contractor drivers generally owned their own vehicles and took their trucks home with them at night. This saved the petitioner the cost of providing security and relieved the petitioner of the responsibility for repairing damage to the vehicles. Furthermore it was more difficult to carry out vandalism against the vehicles when they were dispersed.

Termination of the Strike — Finding of No "Unfair Labor Practice" Strike.

On March 31, 1985, the collective bargaining agreement, under which Local 41 had claimed petitioner was prohibited from use of contractor drivers, expired by its own terms, petitioner having provided due notice of intent to terminate.

On April 9, 1985, the striking employees made an unconditional offer to return to work, confirmed two days later by letter. Petitioner informed the employees that there was no work available for them.

Within a few weeks, the union filed its first unfair labor practices charges (not the charges in question here), which were dismissed by the Board on May 21, 1985. These charges alleged that petitioner discriminated against the striking employees for exercise of protected rights in failing to rehire them upon their unconditional offer to return to work.

In the letter dismissing those first charges, the Regional Director specifically found that there was no unfair labor practice strike, and specifically stated that, because the striking employees were entitled to return to work only at such time as positions were available, "the employer's refusal to immediately reinstate its striking employees is not a violation of the Act."

The Charge in the Case at Bar.

Following the May 21 dismissal of those first charges, there was an exchange of correspondence between Local 41 and petitioner concerning information about the replacement drivers and the status of the bargaining unit drivers,

and about dates to begin negotiation of a new contract. However, the union did not pursue negotiation of a new collective bargaining agreement. Instead, on October 8, 1985, the union filed a new unfair labor practice charge, the charge which is the subject of this petition. The charge alleged that petitioner allowed contractors to perform bargaining unit work following the unconditional offer to return to work and that petitioner thereby violated Section 8(a)(3) of the Act (discrimination).[1]

The charge made no reference of any kind to Section 8(a)(5) (refusal to bargain), nor did it in any way mention bargaining or refusal to engage therein. Furthermore, the charge on its face limited itself to events occurring on or after April 9, 1985—the date of the unconditional offer to return to work, which happened to be precisely six months prior to the filing date of the charge.

The charge was amended on February 20, 1986, mentioning Section 8(a)(5) and raising a claim of refusal to bargain, both for the first time in any document in the case. The amendment expressly referred to actions which occurred not only one year prior to the date of the amended charge, but also more than six months prior to the date of the original charge, for the Section 8(a)(5) conduct was alleged to have occurred "On or about February 1, 1985 . . ." (The ALJ, as affirmed by the Board and the D.C. Circuit,

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[1]This charge, as is the case with all charges filed with the NLRB, also referenced Section 8(a)(1) of the Act; however, this reference is an allegation of a "derivative" Section 8(a)(1) existing only by virtue of the claimed violation of another subsection of Section 8(a). See 1938 NLRN Ann. Rep. 52 (1939). The same is true for subsequent references to Section 8(a)(1) as this case progressed. Consequently, in this Petition we will omit further reference to Section 8(a)(1).

found it occurred between February 20 and March 1, 1985—still beyond the six-month period.)

The administrative complaint issued pursuant to those unfair labor practice charges alleged unlawful refusal to reinstate strikers, and subcontracting bargaining unit work without notice to or bargaining with the union. The complaint contained no allegations, and gave no notice of a claim of, intentional or fraudulent concealment. All claims of refusal to bargain were expressly alleged to have occurred in February, 1985.

The Decision of the NLRB

The Administrative Law Judge, in a 60 page, single-spaced decision issued on September 30, 1986, found that the petitioner had unlawfully failed to bargain with the union when it decided to use contractor drivers during the strike, and that the petitioner wrongfully coerced and discriminated against the striking employees in failing to return them to work following their unconditional offer to return to work.

The National Labor Relations Board, by decision of November 27, 1987, concluded, without explanation that use of contractor drivers "is not equivalent" to use of permanent employee replacements. The Board additionally found that the time limits imposed by Section 10(b) of the National Labor Relations Act (29 USC § 160(b)) did not bar claims for conduct prior to April 9, 1985. In concluding that petitioner had violated Section 8(a)(5) and that the Section 10(b) limitations were tolled, the ALJ as affirmed by the Board relied in part on his finding that petitioner had "fraudulently concealed" the subcontracting from the union. That finding was made by the ALJ despite the fact

that neither "fraudulent concealment" nor any facts to support such a claim were ever charged by the union or alleged by the General Counsel; nor were facts introduced at the hearing to support such a claim; nor did the General Counsel brief the issue to the ALJ. At no time prior to the ALJ's opinion was petitioner on notice that fraudulent concealment was an issue in this matter either to support the substantive violations or to support avoidance of the Section 10(b) limitations.

The Decision of the District of Columbia Court.

At all stages in this proceeding, petitioner relied extensively upon the decision of the Ninth Circuit in *Hawaii Meat Company* v. *NLRB*, 321 F. 2d 397 (9th Cir. 1963), where the court, denying enforcement of an NLRB decision similar to the decision here, held that permanent replacement of striking employee truck drivers with contractor drivers was not a violation of the Act if done for economic reasons.

The District of Columbia Circuit here interpreted *Hawaii Meat* "to stand for no more than the proposition that an employer may not be obliged to bargain with a union about permanent subcontracting during a strike when that subcontracting is necessary to the business purpose of keeping the plant continuously in operation and time of decision is of the essence." And, although acknowledging the right of an employer to permanently replace strikers with new *employees* during a strike, the D. C. Circuit held that replacing strikers with permanent subcontractors is not the equivalent: "We see at least a theoretical distinction, however, and that difference probably has practical consequences." The Circuit Court opined that use of contractors tends to destroy bargaining unit, whereas use of

employee replacements does not. The court declined to address petitioner's argument that the bargaining unit was not destroyed because the striking employees retained their right to reinstatement in the event work became available as, for instance, would occur when some or all contractors ceased working, or in the event of a new collective bargaining agreement under which the employer agreed to rehire the striking employees. The D.C. Circuit concluded there was no need in this case "to consider what circumstances would justify an employer's unilateral decision permanently to subcontract bargaining unit work to withstand a strike," because, the court stated, the case at bar did not even arguably contain circumstances justifying such action.

REASONS FOR GRANTING THIS WRIT

I. First Issue

This Matter Raises an Issue of Importance and the Decision Below Conflicts with a Decision of the Ninth Circuit.

THE IMPORTANCE OF THE ISSUE.

This case provides an opportunity for far-reaching clarification on a long-standing issue: the tension between an employer's right to use an economic weapon of the labor arena—specifically, "permanent replacement"[2] of striking

[2]The phrase "permanent replacement" is employed here as a term of art in the field of federal labor law. It refers to replacement of striking employees in such a way that the employer retains the replacements without intent to immediately reinstate the strikers at the end of the strike. However, as discussed herein, the replaced employees continue to hold the status of employees and continue to hold the right to reinstatement should vacancies materialize, or should the union secure an agreement providing for their reinstatement. Hence, the word "permanent" may appear somewhat misleading if used in the ordinary sense.

employees—and the employer's obligation to bargain over contracting of bargaining unit work. The question whether, and under what circumstances, an employer may utilize permanent replacement of strikers by contractors as a response to an economic strike, would be one of first impression in this Court. A decision here would resolve the apparent disparity between *NLRB* v. *Mackay Radio & T. Co.*, 304 U. S. 333 (1938), and its progeny,[3] on the one hand, and *Fibreboard Corp.* v. *NLRB*, 379 U. S. 203 (1964), on the other. The guidance would be of enormous use both to the National Labor Relations Board, which administers the applicable statutes,[4] and to the employers and labor organizations subject to those statutes.

It has long been established by decisions of this Court, that an employer may "permanently" replace striking employees, and is not obligated to discharge the replacements upon termination of the strike to create places into which to reinstate the strikers. *NLRB* v. *Mackay Radio & T. Co.*, 304 U. S. 333 (1938). However, this Court has never

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[3]In recent years, *Mackay's* progeny includes: *Belknap, Inc.* v. *Hale*, 463 U.S. 491 (1983), where this Court held there was nothing inconsistent with federal labor law in an employer entering into individual employment contracts giving permanent job rights to strike replacements; and *TWA* v. *Independent Fed. of Flight Attendants*, ___ U.S. ___, 57 LW 4283 (1989), where the Court held that the *Mackay* doctrine applies to bargaining unit employees who "cross over" during a strike, and that an employer need not "bump" the crossovers to reinstate more senior strikers, at the strike's end. Prior decisions in the *Mackay* line include: *NLRB* v. *Insurance Agents' International*, 361 U.S. 477 (1960); *NLRB* v. *Brown*, 380 U.S. 278 (1965); and *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967).

[4]The statutes are known as the National Labor Relations Act (NLRA) as amended, or as the Wagner and Taft-Hartley Acts. The pertinent sections are codified at 29 U.S.C. §§ 152-160.

addressed whether, or under what circumstances, such permanent replacements may be contractors, as opposed to employee replacements. Both sides of labor disputes would find the answer to that question highly significant, although it is clear that each side would pursue a different answer before this Court.

The question we request this Court to address is: What must happen to strikers whom an employer has replaced with contractors retained during the strike to perform the work of the strikers, when the strike is over? Section 2(3) of the NLRA has for more than fifty years provided that employees engaged in a strike retain the status of employees (and hence, the status of members of any existing bargaining unit). And the decision in *Mackay* has established for nearly as long that the strikers remain employees even though "permanently" replaced and not reinstated at the end of the strike. See also *NLRB* v. *Fleetwood Trailer Co.*, 389 U. S. 375 (1967). The decisions below indicate that permanent replacement by contractors "destroys the bargaining unit." But this appears to ignore the unequivocal statements of this Court that replaced strikers remain employees (even though not reinstated after the end of the strike) and the inevitable conclusion that, if there continue to be employees, there can continue to be a bargaining unit. It would be incumbent upon the collective bargaining representative to attempt to secure an agreement which would put the employees back to work. But this hardly means there is no bargaining unit, and is precisely the same situation the union would be in had the replacements been "scab" employees instead of contractors.

The proposition that permanent replacement with contractors is more destructive of a bargaining unit than

permanent replacement with employees is flawed. Even the NLRB has recently recognized that replacement employees cannot be presumed to have pro-union sentiments and that an employer may take this into consideration in deciding whether a bargaining obligation has ceased to exist due to the union's loss of majority support from the employees. *Buckley Broadcasting Corporation of California*, 284 NLRB No. 113 (1987) (where the Board reversed its prior policy of presuming union support among strike-replacement employees and noted that that presumption had been rejected by every circuit court which reviewed it). Accordingly, the destructive effect on the bargaining relationship of using contractor replacements cannot be presumed to be greater, or less, than that of using employee replacements.

The issue posed here concerns the economic weapons available to an employer to respond to a strike. The decisions below erroneously focus on bargaining issues, specifically whether the employer must during the strike give notice before "permanently" subcontracting bargaining unit work. Those decisions rely on *Fibreboard Corp.* v. *NLRB*, 379 U. S. 203 (1964), where this Court held that subcontracting is generally a mandatory subject of bargaining. But this focus misses the real issue, which is simply whether permanent replacement with contractors was, at least under the facts of this case, the equivalent of replacement with permanent employees. On this point, the existence of a strike is crucial and, we submit, distinguishes *Fibreboard*, for replacement of employees with new hires would certainly be a mandatory bargaining topic in a *non*-strike situation. The Board would quite properly hold an employer which, unilaterally and without notice, replaced its union employees with new hires guilty of failing to

bargain, even if the employer's motives were wholly nondiscriminatory. But *Mackay* and its progeny make it certain that the same employer may make precisely the same unilateral replacements if a strike is in progress.

The law is clear that an employer need not bargain about the economic weapons used in response to a strike. *NLRB* v. *Insurance Agents' International*, 361 U. S. 477, 490 (1960):

> Our labor policy is not presently erected on a foundation of government control of the results of negotiations. [Citation omitted.] Nor does it contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union.

See also, *NLRB* v. *Brown*, 380 U. S. 278 (1965).

As the District of Columbia Circuit stated below, it has been undisputed that an employer may utilize contractor replacements during a strike, provided they are "temporary" replacements—i.e., subject to termination upon the offer of the striking employees to return to work. And no one has suggested that such "temporary" contracting during a strike would first require notice and bargaining. That, presumably, is why the union here first filed only a Section 8(a)(3) charge, and only belatedly (with obvious prompting from the General Counsel) amended the charge to reference Section 8(a)(5) and bargaining.

The issue is what happens to the strikers, and the replacements, immediately upon the end of the strike, not whether there was bargaining *during* the strike over use of the contractor drivers. This is not a bargaining case but a case concerning the nature and extent of the permissible response to a strike.

The D.C. Circuit held that *Mackay* did not "trump" *Fibreboard;* but it must be recognized that *Fibreboard* was a duty to bargain case in a non-strike setting. In the *Mackay* line of cases, on the other hand, this Court has held and reaffirmed that the long-recognized duty to bargain is not a bar to the utilization by unions and employers of the economic weapons at their disposal during, or in response to, a strike or similar dispute. *Insurance Agents, supra.*

The Court in *Fibreboard* was careful to state that its holding was limited to situations involving appropriate facts. The Court stated ". . . on the facts of this case, the 'contracting out' of the work" is a mandatory bargaining subject, 379 U.S. at 204, and held:

> Our decision need not and does not encompass other forms of "contracting out" or "subcontracting" which arise daily in our complex economy.

Id. at 215. Circuit courts have held contracting out to be exempt from mandatory bargaining under *Fibreboard*, in appropriate cases. See, e.g., *Equitable Gas Co.* v. *NLRB*, 637 F. 2d 980 (3rd Cir. 1981); *NLRB* v. *King Radio Corporation*, 416 F. 2d 569 (10th Cir. 1969), cert. den. 397 U.S. 1007 (1979).

The motive (or "business necessity") of the employer in replacing the striking employee drivers with "permanent" contractor drivers is equally immaterial here. As stated in *Mackay*, all the employer need demonstrate is that the replacements were retained "in an effort to carry on the business." 304 U.S. at 345. This is not the same as showing "business necessity" as is required in the non-strike *(Fibreboard)* case. Nothing in *Mackay* or its progeny indicates that the employer must show that use of *"permanent"* replacements was necessary in order to "carry on the business," or even preferable to do so. Even the

District of Columbia Circuit, in its opinion below, stated in note 6:

> As far as we can tell [the Board] has never held that an employer must meet the burden of demonstrating that defensive measures taken were its only option or that they were the option that would have the least adverse effect on the bargaining unit.

Again, the issue returns to what happened to the strikers and the replacements at the end of the strike, and whether what happened was lawful. If the permanent replacement of employee drivers with contractor drivers was the equivalent of permanent replacement of strikers with "scab" employees under *Mackay*, then it is clear that neither the employer nor the Board would have to demonstrate what were the employer's motives in such action.

The dispute between the employer and the union here concerned interpretation of a collective bargaining agreement and a long established employer practice of using contractor drivers. It was a lawful dispute, under the Act, and both parties were entitled to make use of the economic weapons of the labor arena. The union was striking, in part, to advance its position that the collective bargaining agreement prohibited use of contractor drivers. The employer was using contractor drivers to continue to operate.

We are respectfully requesting this Court to address whether that activity was within the rules of economic contention permitted by the NLRA. As the Court stated in *NLRB v. Insurance Agents' International*, 361 U.S. 477 (1960):

> The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and

> parcel of the system that the Wagner and Taft-Hartley Acts have recognized.

361 U.S. at 489.

We submit that it is a matter of considerable importance whether and to what extent those economic weapons include an employer's replacement of striking employees with contractors, as they clearly include replacement of same with "scab" employees.

CONFLICT WITH ANOTHER APPELLATE COURT.

The District of Columbia Circuit, in the decision below, held that permanent replacement of striking employees with contractors is not the equivalent of permanent replacement of strikers with employees. This decision is in direct conflict with the decision of the Ninth Circuit in *Hawaii Meat Company* v. *NLRB*, 321 F. 2d 397 (9th Cir. 1963), a case heavily relied upon by petitioner in the various proceedings below. In that case, the Ninth Circuit held that an employer may lawfully contract out bargaining unit work, without bargaining, as a response to a strike, and was express in equating such action to use of permanent employee replacements:

> We think it no more proper for the Board to intrude upon the decision of the employer, in a strike situation, to keep going by subcontracting, than to intrude upon a decision to replace, permanently, individual strikers.

321 F. 2d at 400. In coming to that conclusion, the Ninth Circuit expressly relied upon this Court's decision in *NLRB* v. *Mackay Radio & T. Co.*, 304 U.S. 333 (1938), noting that *Mackay* indicates "[a]n employer is under no duty to offer to bargain after a strike starts, about a decision to hire replacements for strikers, even on a permanent basis." *Id.*

The facts in *Hawaii Meat* were strikingly similar to the facts in the case at bar. The company, a meat producer, used trucks for local delivery of its products. As in the instant case, time was essential, for failure to make timely delivery would result in spoilage. The company employed a small group of drivers to operate its trucks. (The bargaining unit encompassed both the truck drivers and a much larger group of production workers.) When a plant-wide strike appeared imminent, the company made contingency arrangements to permanently contract out the delivery aspect of its operation. Upon the advent of the strike, the company effected that contingency, and informed the striking employees that "[t]here are no longer any delivery truck driver or drivers helper jobs." *Id.* at 398. The Regional Director issued a complaint alleging violations of both Section 8(a)(3) (discriminatory discharge of employees) and Section 8(a)(5) (refusal to bargain) on the employer's part —precisely as was the case here—and the Board found a violation of Section 8(a)(5) (although it found it necessary to rule on the Section 8(a)(3) allegations). The Board ordered, inter alia, that the drivers be reinstated with back pay.

But the Ninth Circuit denied enforcement of the Board's decision, holding that the decision to contract was tantamount to a *Mackay* decision to replace.

In the decision below, the District of Columbia Circuit purported to honor the *Hawaii Meat* decision, but gave it a limited interpretation:

> We read *Hawaii Meat*, then to stand for no more than the proposition that an employer may not be obliged to bargain with a union about permanent subcontracting during a strike when that subcontracting is necessary to the business purpose of keeping the plant contin-

> nously in operation and time of decision is of the essence.

Slip Opinion p. 9. The D.C. Circuit read *Hawaii Meat* as "carefully drawn to deal with the exigencies of the particular situation presented, and to exclude from the decision's compass cases like the instant one." *Id.* The D.C. Circuit, thus, imposed on the employer the requirement, applicable in non-strike cases, to show "business necessity" — the *Fibreboard* standard — rather than the *Mackay* standard that the replacement of strikers be an effort to carry on the business during a strike.

We have reviewed *Hawaii Meat* many times and can find nothing in its language limiting the decision in the manner articulated by the D.C. Circuit. The Ninth Circuit was express in equating contracting of bargaining unit work during a strike with the *Mackay* doctrine, and in holding it improper for the Board to "intrude" upon such a decision.

Hence, there is a direct conflict between the doctrine adopted in this decision—which has been officially reported —and the Ninth Circuit's doctrine established in *Hawaii Meat.* (It is interesting to note that this Court in *Mackay* addressed a decision of the Ninth Circuit and, although reversing on an unrelated issue, upheld the Ninth Circuit on the issue, of the propriety of permanent strike replacements. The Ninth Circuit has been consistent in its view of this situation.)

Also erroneously purporting to reconcile itself with *Hawaii Meat* is the decision of the Seventh Circuit in *American Cyanamid Co.* v. *NLRB*, 592 F. 2d 356 (7th Cir. 1979). The Seventh Circuit gave a limited interpretation to *Hawaii Meat*, similar to the reading given by the D.C.

Circuit here (although, unlike the D.C. Circuit, the Seventh Circuit opined that *Hawaii Meat* was decided without reference to *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964); the D.C. Circuit was forceful in rejecting the notion that *Hawaii Meat* was in any way inconsistent with *Fibreboard*. See *Slip Opinion* pp. 9-10, n.5.)

The problem with any attempt to analogize or distinguish between *American Cyanamid* and either *Hawaii Meat* or the instant case is that the strike in *American Cyanamid* was an unfair labor practice strike, and consequently, the striking employees had an automatic right to reinstatement, regardless of the propriety of their replacement. In *Hawaii Meat* the Court rejected claims of an unfair labor practice strike, and in the case at bar no unfair labor practice strike was even claimed to have occurred.

The conflict between circuits is most clearly seen by comparing *Hawaii Meat* and the decision of the D.C. Circuit here. It is irreconcilable, despite language in the D.C. Circuit's opinion to the contrary, and should be resolved by decision of this Court.

II. SECOND ISSUE

The Question of Notice and Opportunity to Respond to an Unpleaded and Unproved Finding of Intentional or Fraudulent Concealment Presents an Important Constitutional Issue.

We have argued under Question 1 that Section 8(a)(5) was not violated by the petitioner's contracting out unit work during an economic strike. However, if it should be determined that the petitioner's decision to contract in February, 1985 violates Section 8(a)(5), then Question 2 presents itself because claims under Section 8(a)(5) were

not raised until well after the expiration of the six months limitation period of Section 10(b).

No charge was ever filed alleging that petitioner violated Section 8(a)(5) after April 9, 1985, when the strikers offered to return to work. Nor did the General Counsel allege any facts in his complaint to support a Section 8(a)(5) violation after April 9, 1985. The ALJ specifically concluded and found that the Section 8(a)(5) failure to bargain occurred between February 20, 1985 and March 1, 1985. The Board adopted those findings and the D.C. Circuit agreed.

The petitioner has consistently asserted, and there is no allegation or proof to the contrary, that since April 9, 1985, it has been willing to bargain with the union over what is to be done with or for the striking employees. The union never pursued bargaining on that issue.

Clearly, the union considered what happened to the striking employees after the strike to be the essential issue as is evident from the language contained in the original Section 8(a)(3) charge filed on October 8, 1985. Just as clearly, the union and the General Counsel later perceived (as the D.C. Circuit acknowledged, *Slip Opinion*, p. 12 n.8) that no Section 8(a)(3) violation for events after April 9, 1985 could be sustained unless the Board could find an 8(a)(5) violation prior to April 9, 1985. The decision on what to do with or for the striking employees *after* the strike was directly dependent on whether the petitioner's decision to contract out work *during* the strike was lawful.

Accordingly, the union, with obvious prompting by the General Counsel, on February 20, 1986, "amended" its October 8, 1985 charge by alleging a new violation under Section 8(a)(5) (failure to bargain) occurring prior to the return of the strikers. (The union also restated its original

Section 8(a)(3) charges for acts occurring after April 9, 1985). The General Counsel's complaint, filed on February 24, 1986, essentially parrots the language contained in the February 20, 1986 charge, i.e., that the petitioner violated Section 8(a)(5) by its subcontracting without bargaining in February, 1985; and violated Section 8(a)(3) by failing to reinstate the striking employees after April 9, 1985.

On its face, the General Counsel's complaint raised untimely matters. The petitioner, in its answer, affirmatively defended, inter alia, that the union's charges were barred by the six-month statute of limitations in Section 10(b) of the Act.

The Board and the D.C. Circuit concluded that the union's Section 8(a)(5) allegation concerning employer conduct in February, 1985 "related back" to the union's Section 8(a)(3) charge filed on October 8, 1985.

However, the ALJ specifically refrained from addressing the "relation back" issue. Instead, in finding that the February, 1986, Section 8(a)(5) charges were not barred by Section 10(b), the ALJ relied heavily on his finding that the petitioner had secretively and fraudulently concealed the subcontracting from the union. The ALJ concluded that the otherwise valid distinctions in *Local Lodge No. 1424, IAM* v. *NLRB*, 362 U.S. 411, 417 (1960), "have no application to a fraudulent concealment of an event urged to toll the statute."

But the General Counsel never urged the tolling of the statute by any facts supporting inferences of, or specific allegations of, fraudulent concealment.

The ALJ's finding and conclusion that the petitioner engaged in fraudulent concealment was never alleged by the union, never pleaded by the General Counsel in its

complaint, nor argued in the General Counsel's brief to the ALJ. No evidence, questioning, or cross-examining on the subject of fraudulent concealment ever took place. The General Counsel's complaint was never amended to assert fraudulent concealment.

In sum, the petitioner was never put on notice that any party was alleging that the petitioner had fraudulently concealed its subcontracting during the strike by the union.

As the Board conceded in its brief to the D.C. Circuit, the union did not file a charge nor did the General Counsel file a complaint alleging refusal to supply relevant information necessary for the union's performance of its representative function. Nor did the Board make any unfair labor practice finding in that regard.

Yet, the Board considered that "fact" to be significant when it entitled a subsection on page seven of its Statement of Case in its brief to the Court of Appeals: "D. The Company Conceals from the Union the Fact that All Bargaining Unit Work Had Been Contracted to Independent Contractors."

Section 10(b) provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . ." 29 U.S.C. § 160(b).

Unquestionably, this Court has long held that as a matter of equitable doctrine, fraudulent concealment is read into every federal statute of limitation and will bar the application of the statute. *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1945). This Court has also long acknowledged that the person seeking avoidance of the statute because of fraud must prove it:

> "Despite the delay in filing his suit, petitioner is entitled to have his cause tried on the merits *if he can*

> *prove* that respondents' responsible agents, agents with some authority in the particular matter, *conducted themselves in such a way that petitioner was justifiably misled* into a good-faith belief that he could begin his action at any time within seven years after it had accrued." (Emphasis added.)

Glus v. *Brooklyn Eastern District Terminal*, 359 U.S. 231, 235 (1959).

Lower federal courts are in accord that, while lack of actual or constructive notice as well as fraudulent concealment bar the application of a statute of limitations, the party seeking the benefit of the avoidance carries the burden of proof to establish the elements. *NLRB* v. *Don Burgess Construction Corporation*, 596 F. 2d 378, 383, n.2, (9th Cir. 1979), *cert. den.* 444 U.S. 940 (1979). Moreover, all presumptions are against him since his claim to exemption is against all the current of the law. *Id.* See also *Charlotte Telecasters* v. *Jefferson Pilot Corp.*, 546 F. 2d 570, 574 (4th Cir. 1976). Yet, in this case, the ALJ not only confused the allocation of the burden of proof, but also injected a new theory—fraudulent concealment.

The General Counsel did not allege lack of actual or constructive notice in its complaint. Nor did the General Counsel allege fraudulent concealment by petitioner of any facts or information upon which the union relied to its detriment, nor any facts supporting a fair inference of fraudulent concealment. Yet the ALJ's conclusion that Section 10(b) was tolled ultimately turned on a factual finding which had never been alleged prior to or litigated at the hearing, i.e. that the Company *fraudulently concealed* the subcontracting.

The due process implications are obvious. "Due process forbids the ALJ from gratuitously injecting new issues into the case and deciding them *sua sponte*." *Soule Glass and Glazing Co.* v. *NLRB*, 652 F. 2d 1055, 1079 (1st Cir. 1981). "Failure to clearly define the issues and advise an employer charged with a violation of the law of the specific complaint he must meet and provide a full hearing upon the issue presented is, of course, to deny procedural due process of law." *J.C. Penney* v. *NLRB*, 384 F. 2d 479, 483 (10th Cir. 1967).

The Federal Courts of Appeals have recognized the importance of notice and an oportunity to litigate in NLRB proceedings, both as to employers and union: *NLRB* v. *Tamper, Inc.*, 522 F. 2d 781, 789 (4th Cir. 1975) ("We believe it is an intolerable miscarriage of justice to attribute improper motives to the company officials without affording them an opportunity to defend themselves. This form of trial without notice should not be condoned."); *NLRB* v. *Quality C.A.T.V., Inc.*, 824 F. 2d 542, 546 (7th Cir. 1987) ("The test of due process in this setting is a determination of fair notice and whether fair notice is given by way of pleading, or by way of the course of proceeding of a full litigation, the crucial focus is at all times on whether notice was given which provided the party with an adequate opportunity to prepare and present its evidence."); *NLRB* v. *Blake Construction Co., Inc.*, 663 F. 2d 272, 279 (D.C. Cir. 1981) ("Even where the record contains evidence supporting a remedial order, the court will not grant enforcement in the absence of either a supporting allegation in the complaint or a meaningful opportunity to litigate the underlying issue in the hearing itself."); *Road Sprinklers*

Fitters Local Union No. 669 v. *NLRB*, 778 F. 2d 8, 16 (D.C. Cir. 1985) ("But responsibility for Grinnell's failure to hire was not charged, and neither the complaint nor the course of the hearing before the ALJ put Local 669 on notice that would be at issue. We do not know, then, what the evidence would have shown had the union been afforded an opportunity to contest the point."); *Intern. Ass'n. of Bridge* v. *NLRB*, 792 F. 2d 241, 245 (D.C. Cir. 1986); ("Since the Board does not contend that the 'indirect coercion' violation was actually litigated at any point during the course of the abbreviated proceeding before the Board, the findings of that violation cannot be reconciled with the requirements of *Blake Construction*.")

The ALJ's finding of fraudulent concealment, adopted by the Board, was obviously a critical factor in the conclusion that Section 10(b) was tolled to make the February 20, 1986, Section 8(a)(5) charge timely. The significance of that finding is underscored by the Circuit Court's opinion in which the Court cited to *ILGWU* v. *NLRB*, 463 F. 2d 907, 922 (D.C. Cir. 1972). The *ILGWU* case, as the cited quotation indicates, held that Section 10(b) was tolled because of the employer's fraudulent concealment. *Slip Opinion*, at 13.

Clearly, if the General Counsel wished to avoid the six-month limitation because of fraudulent concealment of material facts from the union, he had the obligation of pleading, proving and arguing same. He did not. That equitable doctrine was not even mentioned until the ALJ rendered his opinion. From that point on, the employer took exception to the finding, to no avail.

Petitioner is requesting this Court to grant certiorari to determine whether petitioner's due process rights under the Fifth Amendment to the United States Constitution

were violated when it had no notice or opportunity to rebut the ALJ findings relied upon to deprive petitioner of the applicable Section 10(b) limitations.

CONCLUSION

We respectfully submit that this petition for certiorari should be granted to address these issues of importance and to resolve the conflict with another appellate court. (Question 3, as stated at outset, is not offered as a basis for grant of certiorari, but to preserve the issue. This is necessary, in part, to demonstrate the determinative effect of Question 2.)

Respectfully submitted,

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88- 1806

No.

Supreme Court, U.S.
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MAY 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

LAND AIR DELIVERY, INC., - - - Petitioner

versus

NATIONAL LABOR RELATIONS BOARD, - - - - - - - - Respondent

APPENDIX TO PETITION FOR CERTIORARI

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TABLE OF CONTENTS

PAGE

[Note: The required Rule 28.1 statement appears in the accompanying Petition For Writ of Certiorari.]

Opinion and Judgment of Court of Appeals (as originally decided, December 2, 1988) 1

Order of Court of Appeals, denying petition for rehearing (entered March 2, 1989) 15

Order of Court of Appeals denying suggestion that rehearing be *en banc* (March 2, 1989) 16

Order of Court of Appeals denying motion to stay mandate (March 29, 1989) 17

Order of Court of Appeals amending original opinion (March 29, 1989) 18

Decision and Order of NLRB (November 27, 1987) ... 19

Decision and Recommended Order of ALJ (September 30, 1986) 26

UNITED STATES COURT OF APPEALS

No. 87-1758

Argued October 3, 1988 Decided December 2, 1988

LAND AIR DELIVERY, INC., - - - - - *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, - - *Respondent*

Petition for Review of an Order of the
National Labor Relations Board

David Leightty, with whom *Louis J. Amato* was on the brief, for petitioner.

Joseph A. Oertel, Attorney, National Labor Relations Board, with whom *Aileen A. Armstrong,* Deputy Associate General Counsel, and *Howard E. Perlstein,* Attorney, National Labor Relations Board, were on the brief for respondent.

Before: RUTH B. GINSBURG and SILBERMAN, *Circuit Judges,* and MILTON POLLACK,* *Senior District Judge,* United States District Court for the Southern District of New York.

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

SILBERMAN, *Circuit Judge:* This is a petition for review of a decision by the National Labor Relations Board. The Board affirmed a finding by an administrative law judge that Land Air Delivery, Inc. violated sections 8(a)(5) and 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(5) & 158(a)(1) (1982), by permanently contracting out bargaining unit work during the course of a strike

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*Sitting by designation pursuant to 28 U.S.C. § 294(d).

without notifying and bargaining with the Teamsters Local. The Board also found that Land Air violated sections 8(a)(3) and 8(a)(1) of the Act, 29 U.S.C. §§ 158(a)(3) & 158(a)(1), by refusing to reinstate strikers, who made an unconditional offer to return to work, in place of new independent contractors. We conclude that the Board's decision was supported by substantial evidence in the record as a whole, and therefore we deny the petition for review.

I.

Land Air Delivery, Inc. is an air freight motor carrier that engages in the pickup and delivery of small packages for overnight carriers. In 1973, the Board certified Teamsters Local 41 as the exclusive bargaining agent of "[a]ll truck drivers and warehousemen" employed by Land Air. In 1975, the Board clarified the bargaining unit by excluding independent contractors who transported freight for Land Air. At the time of the strike that led to this litigation, Land Air employed 13 bargaining unit truckdrivers and used an additional group of independent contractor drivers.

The unit employees were covered by the Teamsters' National Master Freight Agreement ("NMFA"), which was effective from March 1, 1982 to March 31, 1985. The extent of Land Air's use of independent contractors was a major issue in the 1982 negotiations for a new contract. Petitioner presented at least three subcontracting proposals to the union during their negotiations, and the union rejected each one. The union insisted upon the more restrictive subcontracting language provided in Article 32 of the NMFA, which prohibited the subcontracting of work that employees in the bargaining unit performed. The parties eventually reached a bargaining impasse in late 1982 over the subcontracting language (and over an acceptable grievance machinery), and the union struck to

enforce its demands. After three days, Land Air agreed to the subcontracting language in the NMFA.

In November 1984, the union notified the company that the union had authorized a strike, pursuant to the terms of the NMFA, to protest both the company's failure to comply with certain grievance awards and its refusal to take a deadlocked grievance to the next step of the grievance procedure. All 13 unit employees struck, and Land Air immediately hired replacement workers. To continue its business during the strike in Kansas City, Land Air used a mix of employees from other locations, its contractors and contractor drivers, newly-hired employees, and its own staff and supervisors. The company hired eight new employees in November and December 1984; three of these employees were terminated in December 1984, and five were terminated on March 28, 1985. Thus, as of March 28, 1985, Land Air had terminated all of its replacement employees.

The company also signed agreements with 12 independent contractors between February 20 and March 1, 1985. Five of these persons had not been contractors before the strike, and all 12 contractors continued to work for Land Air after the end of the strike. Although the exact timing is not clear from the record, the combination of subcontracting on February 20 and March 1 and termination of replacement employees on March 28 resulted in the elimination of all bargaining unit positions by March 1985.

The strike lasted almost five months, until April 1985, and it resulted in violent action by the strikers against replacement workers and company property. During the course of the strike, Land Air filed an unfair labor practice charge against the union stemming from these acts of violence and coercion. On February 4, 1985, the union entered into an informal settlement agreement, which contained a nonadmission clause, and it also issued a Notice to

Employees and Members that it would not engage in coercive acts.

The strike ended on April 9, 1985, when the union members offered orally to return to work unconditionally. At that time, the general manager of Land Air informed the former strikers that there was no work for them. On April 11, the union's business agent communicated the same unconditional offer to Land Air by mail. Land Air took no action to reinstate the striking employees, and the union filed a charge against the company alleging that it had committed an unfair labor practice by refusing to reinstate the strikers. The Board's regional director dismissed the charge, finding that "the subject strike was an economic strike giving the employees the right to reinstatement only at such time when positions become available." Because Land Air had not hired any new employees since the unconditional offer of April 9, the regional director concluded that the company's refusal to reinstate the strikers was not a violation of the Act.

After the regional director issued his ruling, the union made several requests for employment information from Land Air. On June 3, the union asked whether the company had hired any new employees since April 1, 1985 or whether any of the work previously performed by the bargaining unit employees was subcontracted as of June 3. Land Air, erroneously stating that the inquiry involved matters relating to a pending case before the Board,[1] declined to comment on the inquiry. On June 22, the union went back on strike. On July 16, the union's attorney again requested information from the company, this time asking for "the employment status of each and every member with Land Air Delivery, Inc." Land Air responded that it would

[1]The relevant unfair labor practice charge was dismissed on May 21, 1985, and the period allowed for filing an appeal had expired by the date of Land Air's response.

reply to the request by August 2, but it failed to do so. On August 16, the union's attorney again requested employment information from the company and, for the first time, accused Land Air of subcontracting bargaining unit work without first bargaining with the union.

On August 22 1985, Land Air's attorney responded to the union's queries. His letter stated that with regard to "putting a label" on the employment status of the persons working for the company, "your guess is as good as mine." He went on to say that during the strike, the company "hired some additional employees as replacements and continued to conduct business as it formerly did prior to the strike." On October 9, 1985, after some further communication with the company, the union filed a charge with the Board asserting that Land Air had violated sections 8(a)(1) and (3) of the Act by, *inter alia*, "continu[ing] to allow independent contractors or sub-Independent contractors to continue to perform work of the bargaining unit once there was an unconditional offer to return to work." On February 20, 1986, the union filed an amended charge alleging violations of sections 8(a)(1), (3), and (5), and specifying:

> On or about February 1, 1985, [Land Air] by its officers, agents and representatives subcontracted out bargaining unit work without notice to or bargaining with the Union.
>
> On or about April 9, 1985, [Land Air] by its officers, agents and representatives failed and refused to reinstate striking employees who had made an unconditional offer to return to work.

The administrative law judge found that Land Air had violated sections 8(a)(1), (3), and (5) of the Act by permanently subcontracting unit work without prior bargaining. He determined that by March 1985, petitioner had contracted out all bargaining unit positions. He ordered

the company to reinstate nine strikers and directed that they receive backpay from Land Air (four of the striking employees were not ordered reinstated because of specific instances of employee misconduct). The ALJ rejected the company's claim that the union's charges were barred by the statute of limitations in section 10(b) of the Act, 29 U.S.C. § 160(b) (1982). The Board affirmed the ALJ's findings on these issues, and Land Air petitions this court for review.

II.

Petitioner contends that as a matter of law an employer is entitled to replace economic strikers permanently with subcontractors *at any time* during the strike without bargaining with the union over that decision.[2] The Board, on the other hand, appears to maintain that an employer is *never* (even during an economic strike) permitted to subcontract permanently, without bargaining over the decision.[3] We reject petitioner's contention, and do not find it necessary, in order to resolve this case, to pass on the Board's proposition. Even if pressing "business necessity"

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[2]Although neither petitioner nor the Board in their briefs is entirely clear as to what is meant by *permanent* subcontracting, we take the term to mean subcontracting for an indefinite future period not to terminate at the expiration of the strike.

[3]The Board urged that an employer has two options when faced with an economic strike: (1) it can hire permanent employee replacements or (2) it can contract out the work on a temporary basis. *But cf. Elliott River Tours, Inc.*, 246 N.L.R.B. 935 (1979) (Board countenanced contracting out for two years, which exceeded the duration of the strike, because subcontractor demanded long term as condition for taking on the work). In view of *Elliott River Tours*, we do not take the Board's current position to preclude argument that at least long-term subcontracting is available in special circumstances, *i.e.*, when permanent replacements or temporary subcontractors are not viable options.

would justify permanently contracting out unit work. Land Air has not shown such necessity here.

Long settled is the rule that an employer—at least absent an economic strike—is obliged to bargain with his union before he decides to subcontract. The basis for this requirement is that subcontracting erodes the bargaining unit and is an "appropriate" subject for collective bargaining. *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U. S. 203 (1964). Also long settled, however, is the principle that an employer faced with an economic strike is entitled to replace strikers permanently with new employees. *NLRB* v. *Mackay Radio*, 304 U. S. 333 (1938). Land Air claims that *Mackay Radio* in effect "trumps" *Fibreboard*, because there is no meaningful distinction between replacing strikers with permanent employees and replacing them with permanent subcontractors. We see at least a theoretical distinction, however, and that difference probably has practical consequences.

A permanent subcontract diminishes the bargaining unit by the scope of the subcontract. *See International Union, UAW* v. *NLRB*, 381 F. 2d 265, 266 (D.C. Cir.), *cert. denied*, 389 U. S. 857 (1967). Contracting out all bargaining unit work, as occurred in this case, completely destroys the bargaining unit. Although as a practical matter it may be true that total replacement of strikers by new permanent employees will often result in a decertification of the union, there is a legal difference between the employer unilaterally dissolving the unit by contracting out its work and the employees in the unit themselves decertifying the union. Until decertification, the employer is obliged to bargain with the striking union over all terms and conditions of employment in the bargaining unit, and his obligation would be lessened if a portion of the work of the unit were permanently subcontracted. Bringing on permanent replacements, moreover, does not necessarily lead to the extinction of the

bargaining unit. A striking union might be able to gain the allegiance of at least some of the replacement employees who, combined with strikers, could provide the union with continued majority support. We think, therefore, that the Board is within its authority to treat permanent subcontracting during a strike differently from the use of permanent employee replacements for purposes of section 8(a)(5) of the Act.[4]

Despite our conclusion that permanent subcontracting is not legally equivalent to the use of permanent replacements, we still must confront the question whether permanent subcontracting violated the NLRA under the circumstances of this case. Petitioner relies for support primarily on the decision of the Ninth Circuit in *Hawaii Meat Company* v. *NLRB*, 321 F. 2d 397 (9th Cir. 1963), where the court held that an employer's unilateral decision to subcontract work permanently during an economic strike did not violate section 8(a)(5). *But cf. American Cyanamid* v. *NLRB*, 592 F. 2d 356, 360 n.7 (7th Cir. 1978) (reading *Hawaii Meat* as compatible with distinction between generally permissible temporary subcontracting in face of strike and generally impermissible permanent subcontracting); *see also Soule Glass & Glazing Co.* v. *NLRB*, 652 F. 2d 1055, 1088-89 (1st Cir. 1981); *NLRB* v. *King Radio Corp.*, 416 F. 2d 569, 572 (10th Cir. 1969) (distinguishing between

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[4]Petitioner claims that his decision to subcontract did not foreclose reemployment of strikers, because it planned to offer strikers the right to reinstatement if the subcontractors ceased operations. This argument, as far as we can determine, was not preserved in Land Air's exceptions to the ALJ's decision or presented to the Board, so it is not properly before us. We note, however, that unless petitioner was asserting that the subcontracting was really temporary, *cf. Elliott River Tours, Inc.*, *supra* note 3, the argument misses the point, for whether or not petitioner was prepared to reemploy strikers if the subcontractors terminated their relationship, the bargaining unit was truncated in the meantime.

permanent and temporary subcontracting). Judge Duniway's opinion in *Hawaii Meat*, however, was carefully drawn to deal with the exigencies of the particular situation presented, and to exclude from the decision's compass cases like the instant one. In *Hawaii Meat*, the employer determined before the strike to subcontract permanently its hauling operations in the event of a strike, and it notified the union of its plans just before the strike. It was undisputed that the employer's purpose in subcontracting was totally defensive—to keep its plant operating during the strike. *Id.* at 399. The court rejected the Board's finding of a violation of section 8(a)(5), because to require an employer to bargain to impasse over a subcontracting decision under those exigent circumstances would be to give the union a practical veto over the decision. As the court observed, the union could easily delay an impasse and thereby prevent the employer from continuing business during the strike. *See id.* at 400. We read *Hawaii Meat*, then, to stand for no more than the proposition that an employer may not be obliged to bargain with a union about permanent subcontracting during a strike when that subcontracting is necessary to the business purpose of keeping the plant continuously in operation and time of decision is of the essence.[5]

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[5]The Board's brief dismisses *Hawaii Meat* altogether, because it was decided prior to the Supreme Court's decision in *Fibreboard*. That position seems quite disingenuous to us, because the court in *Hawaii Meat* assumed the result in *Fibreboard*, as it had been decided by the Board and by this court. *See Hawaii Meat*, 321 F.2d at 399. Indeed, Judge Duniway's reasoning, suggesting that it is anomalous to require an employer to bargain with the union about measures the employer needs and will use to blunt a strike before they are employed, does not appear inconsistent with Chief Justice Warren's opinion in *Fibreboard*, which focused on the "appropriateness" of bargaining over the subcontracting decision. *Fibreboard*, 379 U.S. at 214.

Although the Board has permitted unilateral subcontracting that extends beyond the end of a strike in a case where the subcontractor insisted on such an arrangement, *see Elliott River Tours*, 246 N.L.R.B. 935 (1979) (two year subcontract), it does not appear to have accepted even our narrow reading of *Hawaii Meat* that permanent subcontracting may be undertaken without first bargaining when needed to continue operations. *See supra* note 3. It is unnecessary for us to pass on the Board's reluctance to endorse *Hawaii Meat*, however, because it is clear to us that the ALJ was amply supported in his finding that petitioner's decision was not motivated by business necessity.[6]

The subcontracting at issue in this case took place more than three months after the strike started, and Land Air had successfully operated during that entire period with a mixture of employees from other locations, pre-strike contractors, new employees, and office staff and supervisors. Although the employer pointed to violence by union members and large security expenses as the business reason for the decision, the subcontracting did not take place until after the union had settled the employer's unfair labor practice charge stemming from the violence. Thus, since

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[6]In its line of cases concerning temporary subcontracting during an economic strike, the Board uses the phrase "business necessity" to refer to decisions motivated by the desire to maintain business operations during the course of a strike. *See Elliott River Tours*, 246 N.L.R.B. at 935; *Empire Terminal*, 151 N.L.R.B. 1359, 1364-65 (1965), *aff'd sub nom. Dallas General Drivers, Local No. 745 v. NLRB*, 355 F.2d 842 (D.C. Cir. 1966); *Shell Oil Co.*, 149 N.L.R.B. 283, 285 (1964). It is not clear from the Board's decisions where the burden of proof lies on that issue, nor has the Board enunciated a standard of proof. As far as we can tell, for example, it has never held that an employer must meet the burden of demonstrating that defensive measures taken were its only option or that they were the option that would have the least adverse effect on the bargaining unit.

the ALJ found no evidence of violence after the entry of the settlement agreement, it was reasonable for him to conclude that the contracting out was not an effort to avoid violence. (If the ALJ's determination were unsupported, we would have quite a different case.) And, despite petitioner's contention that the employees themselves asked to be converted to subcontractors, the ALJ found that the employees had not demanded subcontractor status as a condition for their continued service. In fact, Land Air's president testified before the ALJ that the reason for the shift to independent contractors was "something that had happened somewhere as far as court cases were concerned . . . ."

In the context of the past years of dispute between petitioner and the union over the degree of subcontracting, Land Air's decision to subcontract all of its driving work during the union's ineffective strike hardly looks motivated by business necessity. Rather, it appears that petitioner seized the opportunity it thought legally available to fashion a final solution to the dispute over the use of independent contractors. There is no reason to believe that negotiation with the union over that issue was any more inappropriate or anomalous in March 1985 than it had been in previous years. *See American Cyanamid Co. v. NLRB*, 592 F. 2d 356, 361 (7th Cir. 1979) ("There has been no showing that this company would have been harmed by negotiating with the union [during a strike] prior to contracting out the maintenance work permanently."). The union could not have at that point, as it could have in *Hawaii Meat*, used manipulative bargaining to stymie Land Air's efforts to maintain operations.[7]

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[7]The Seventh Circuit in *American Cyanamid* seems to suggest that an initial decision to subcontract in the face of a strike is by definition always temporary and becomes permanent only at the employer's discretion (perhaps only when he refuses to reinstate

(Footnote Continued on Next Page)

So, we see no need to consider what circumstances would justify an employer's unilateral decision permanently to subcontract bargaining unit work to withstand a strike. Whatever those circumstances arguably might be, they do not exist in this case. Land Air was able to operate at the onset of the strike without permanently contracting out unit work, and there is no evidence that it was unable to continuing doing so.[8]

III.

Land Air's final contention is that the union's claim is barred by the statute of limitations in section 10(b) of the Act, which provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . ." 29 U.S.C. § 160(b) (1982). The union's unconditional offer to return to work came on April 9, 1985; the union filed its original charge, alleging a violation of sections 8(a)(3) and (1) on October 9, 1985, and it filed an amended charge,

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strikers). 592 F.2d at 360. But that view ignores the prospect that an employer may not be able easily to obtain subcontracting on a temporary basis. In that regard, the *American Cyanamid* court may not have fully comprehended the Ninth Circuit's *Hawaii Meat* opinion; the court there held that the employer did not have to bargain *before* making its decision to subcontract permanently, but might have to bargain *after* the decision if the union asked to bargain about whether to keep the subcontracting arrangement in effect once the strike ended. *Compare American Cyanamid*, 592 F.2d at 360 n.7 *with Hawaii Meat*, 321 F.2d at 399.

[8]Because the company's unilateral decision to use contractors was illegal under section 8(a)(5), it follows that the use of contractors cannot justify the company's refusal to reinstate the employees. Thus, the Board also was correct to find a violation of section 8(a)(3).

which specifically alleged a violation of section 8(a)(5), on February 20, 1986.

We agree with the Board that although the alleged violation of section 8(a)(5) took place more than six months before the filing of the amended complaint on February 20, 1986, the union did not have notice of the permanent subcontracting of unit work until a date within the six month period preceding February 20. The limitations period does not begin to run until the party filing the charge knows or has reason to know that an unfair labor pratice has occurred. *See, e.g., NLRB v. International Brotherhood of Electrical Workers*, 827 F.2d 530, 533 (9th Cir. 1987); *Teamsters Local Union No. 42 v. NLRB*, 825 F. 2d 608, 614 (1st Cir. 1987); *cf. ILGWU v. NLRB*, 463 F.2d 907, 922 (D.C. Cir. 1972) (where union's "failure to file a charge within six months . . . [is] due to the company's fraudulent concealment of its plans rather than the union's lack of diligence," time bar is tolled). Although the union did accuse the employer on August 16, 1986 of unilaterallly subcontracting unit work, Land Air's return letter of August 22, which stated that the company had "continued to conduct business as it formerly did prior to the strike," could reasonably have been construed as a denial.

Alternatively, we agree with the Board that the original charge, which was filed within six months of the unconditional offer to return to work, was sufficient to support the General Counsel's section 8(a)(5) complaint. It alleged, *inter alia*, that Land Air had "continued to allow independent contractors or sub-Independent contractors to continue to perform work of the bargaining unit once there was an unconditional offer to return to work." The Supreme Court has instructed that in framing its complaint, the Board is not limited to specific matters alleged in the charge, *NLRB v. Faint Milling Co.*, 360 U.S. 301, 307-08 (1959), and we have recently held that "when the Board

ventures outside the strict confines of the charge, it must limit itself to matters sharing a significant factual affiliation with the activity alleged in the charge." *G.W. Galloway Co. v. NLRB*, 856 F.2d 275, 280 (D.C. Cir 1988). Because the factual activity alleged in the union's charge in this case was the *precise activity* that supported the Board's allegations under section 8(a)(5), it seems clear that the Board did limit itself to matters "sharing a significant factual affiliation" with the activity alleged in the original charge.

* * * *

For the foregoing reasons, the petition for review is *Denied.*

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-1758

September Term, 1988

LAND AIR DELIVERY, INC., - - - - *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, - - *Respondent*

BEFORE: Ruth B. Ginsburg and Silberman, Circuit Judges, and Pollack, Senior District Judge, U.S. District Court for the Southern District of New York

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ORDER — Filed March 2, 1989

Upon consideration of petitioner's petition for rehearing, filed January 18, 1989, and of petitioner's motion to supplement the appendix it is

ORDERED, by the Court, that the motion to supplement the appendix is denied and it is

FURTHER ORDERED, by the Court, that the petition for rehearing is denied.

For The Court:
Constance L. Dupre, Clerk

(s) By: Robert A. Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-1758

September Term, 1988

LAND AIR DELIVERY, INC., - - - - - *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, - - *Respondent*

BEFORE: Wald, Chief Judge, Robinson, Mikva, Edwards, Ruth B. Ginsburg, Starr, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges

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ORDER — Filed March 2, 1989

Petitioner's Suggestion For Rehearing *En Banc* has been circulated to the full court along with petitioner's motion to supplement the appendix. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the motion to supplement the appendix is denied and, no member of the court having requested the taking of a vote upon the suggestion, it is

FURTHER ORDERED, by the court *en banc*, that the suggestion for rehearing *en banc* is denied.

For The Court:

Constance L. Dupre, Clerk

(s) By: Robert A. Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-1758

September Term, 1988

LAND AIR DELIVERY, INC., - - - - *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, - - *Respondent*

BEFORE: Ruth B. Ginsburg and Silberman, Circuit Judges, and Pollack, Senior District Judge, U.S. District Court for the Southern District of New York

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ORDER — Filed March 29, 1989

Upon consideration of petitioner's Motion to Stay Mandate it is

ORDERED, by the Court, that the motion is denied.

For The Court:

Constance L. Dupre, Clerk

(s) By: Robert A. Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-1758

September Term, 1988

LAND AIR DELIVERY, INC., - - - - *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, - - *Respondent*

BEFORE: Ruth B. Ginsburg and Silberman, Circuit Judges, and Pollack, Senior District Judge, U.S. District Court for the Southern District of New York

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ORDER — Filed March 29, 1989

Upon consideration of the Motion of the National Labor Relations Board to Correct Inadvertent Error in Court's Order it is

ORDERED, by the Court, that the motion is granted and the opinion of the court filed on December 2, 1988 is amended as follows:

Delete the last paragraph of the opinion at page 14, and substitute therefor

For the foregoing reasons, the petition for review is denied and the Board's cross-application for enforcement is granted.

For The Court:

Constance L. Dupre, Clerk

(s) By: Robert A. Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

Case 17—CA—12750

LAND AIR DELIVERY, INC.,

AND

TEAMSTERS LOCAL 41, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL–CIO[1]

DECISION AND ORDER

On 30 September 1986 Administrative Law Judge Robert G. Romano issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions,[3] to

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[1]On 1 November 1987 the Teamsters International Union was readmitted to the AFL-CIO. Accordingly, the caption has been amended to reflect that change.

[2]The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F. 2d 362 (3d Cir. 1951). We have

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carefully examined the record and find no basis for reversing the findings.

[3]We agree with the judge that the Respondent's defense based on Sec. 10(b) of the Act lacks merit because the Union did not have notice of the permanent subcontracting of unit work until a date within the 6-month period preceding the filing of the 20 February 1986 amended charge.

In addition, we would find that Sec. 10(b) does not bar this action even if the Union was somehow on notice of the permanent nature of the subcontracting as of 9 April 1985, when the Respondent responded to the strikers' unconditional offer to return by telling them that there was no work available. This is so because the 8 October 1985 charge was filed within 6 months, thereafter, and, although it alleged a violation only of Sec. 8(a)(3) and (1) of the Act, it described the conduct complained of in terms sufficient to encompass the complaint allegations that the Respondent had contracted out the bargaining unit work without prior notice to or bargaining with the Union. (Thus, the October 1985 charge had alleged, inter alia, that in violation of Sec. 8(a)(3) of the Act, the Respondent hired one employee and caused some of its independent contractors to hire other employees or "subindependent contractors" to perform bargaining unit work; and had also alleged that the Respondent continued to allow independent contractors or subindependent contractors to perform such work even after the striking bargaining unit employees had offered to return to work.) The February 1986 amendment to the charge, elaborating on the legal theory, was thus not an essential predicate for the complaint, as the October 1985 charge sufficiently identified the conduct in question to accord due process and fulfill the function of a charge under the Act's procedural scheme. See *NLRB* v. *Fant Milling Co.*, 360 U.S. 301, 307 (1959); *National Maritime Union* v. *NLRB*, 683 F. 2d 305, 307—308 (9th Cir. 1982); *NLRB* v. *Allen's I.G.A. Foodliner*, 651 F. 2d 438, 441—442 (6th Cir. 1981).

modify the remedy,[4] and to adopt the recommended Order as modified.[5]

The Respondent, Land Air Delivery, Inc., is an air freight motor carrier engaged in the interstate transportation of air freight shipments between airports. On 13 November 1984, during the term of the collective-bargaining agreement (1 March 1982 through March 1985), the Union began a lawful economic strike against Land Air to force it to process further certain grievances that were deadlocked at the Grievance Committee and to comply with certain other Committee decisions. Some of these grievances concerned alleged breaches of the subcontracting clause contained in the collective-bargaining agreement between the Union and the Respondent. The Respondent admits that it subcontracted all unit work and maintains that the work has been entirely contracted out since at least March 1985, the subcontracting at issue occurring primarily between 20 February and 1 March 1985. The Respondent acknowledges that it did not give notice to or bargain with the Union concerning its decision to subcontract part and then

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[4]In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB No. 181 (May 28, 1987), interest on and after 1 January 1987 shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to 1 January 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621) shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[5]The judge granted the General Counsel's request that the Order include a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure under the supervision of the United States court of appeals enforcing the Order. We have concluded that in the circumstances of this case such a clause is not warranted. We shall modify the recommended Order accordingly.

the entirety of the unit work. On 9 April 1985 the 13 striking employees made an unconditional offer to return to work. At no time did the Respondent recall any of the strikers.

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by permanently contracting out all unit work to independent contractors, without any prior notice to the Union and without affording the Union an opportunity to negotiate and bargain. The judge further found that the Respondent violated Section 8(a)(3) and (1) because since the strikers' unconditional offer to return to work on 9 April 1985, Respondent has failed and refused to reinstate the employees.[6]

The Respondent urges that it was within its rights to permanently replace the strikers by contracting out the bargaining unit work without notice to or bargaining with the Union. The flaw in the Respondent's argument is that permanently contracting out the work of unit employees is not equivalent to replacement of one employee by another. *American Cyanamid Co.*, 235 NLRB 1316 (1978), enfd. 592 F. 2d 356 (7th Cir. 1979); *Alexander Linn Hospital Assn.*, 244 NLRB 387 (1979), enfd. 624 F. 2d 1090 (3d Cir. 1980). With regard to replacing the strikers, the Respondent had two options to assure its continued operation: the Respondent had the right to hire permanent employee replacements, the strikers thereby retaining reinstatement rights

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[6]Four of the striking employees are not entitled to reinstatement because of certain specific individual instances of employee misconduct. The evidence before us is insufficient to establish that the Union was responsible for the strike-related misconduct and we agree with the judge that the misconduct present here does not warrant depriving the Union of its representative status as in *Laura Modes Co.*, 144 NLRB 1592 (1963). Chairman Dotson agrees that a *Laura Modes* sanction is inappropriate because the strike misconduct cannot be attributed to the Union.

in accordance with *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F. 2d 99 (1969), cert. denied 397 U.S. 920 (1970); or the Respondent had the right to contract out the work temporarily for the duration of the strike, in accordance with *American Cyanamid, supra.*[7] The Respondent's admitted course of action—unilateral permanent contracting out of the work—is, absent proof that the options set forth above were unavailable to it, not permissible under the Act.[8] Thus, we agree with the judge that the Respondent's

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[7]The Union is not challenging the Respondent's right to continue operating by contracting out unit work on a temporary basis. As the Seventh Circuit observed in *American Cyanamid, supra,* 592 F. 2d at 360—361:

> [The Union] objects only to the Company's unilateral decision to make the arrangement permanent in the absence of an emergency. This Company did not need to effectuate permanent contracting out to remain in business because the plant had been operational since the inception of the strike through temporary arrangements . . . nor was that contractor requiring that relations with the Company remain permanent as a condition of continuing to work for the Company. There has been no showing that this Company would have been harmed by negotiating with the Union prior to contracting out the . . . work permanently. Therefore no justification has been shown for the Company's failure to observe the bargaining obligations set forth in the Act.

[8]Permanent subcontracting is distinguished from non-permanent, stopgap, or temporary measures entered into by an employer to continue service during a strike. See *Empire Terminal Warehouse Co.*, 151 NLRB 1359, 1364—1365 (1965). An employer is not under a duty to bargain over temporary subcontracting necessitated by a strike where such subcontracting does not transcend reasonable measures necessary to maintain operations in strike circumstances. See, e.g., *Shell Oil Co.*, 149 NLRB 283 (1964). The appropriate temporary character may exist even if the subcontract period extends beyond the strike, provided the

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permanent contracting out the work previously performed by bargaining unit employees without notifying and bargaining with the Union constituted an unfair labor practice, even though done in the course of a strike.[9] Refusing to afford the strikers their reinstatement rights, in reliance on the unlawful contracting, further violated the Act as found by the judge.

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subcontracts when entered are only of such duration as is dictated by the exigencies of the strike, or because of the threat of imminent strike. See, e.g., *Elliot River Tours*, 246 NLRB 935 (1979).

[9]We agree with the judge's conclusion that the decision was a mandatory subject of bargaining, consistent with *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 687 (1981), and with any of the views expressed in the Board's decision in *Otis Elevator*, 269 NLRB 891 (1984). Chairman Dotson agrees with the judge's findings and conclusions, based on the opinion of former Member Hunter and himself in *Otis Elevator*, supra, that the Respondent's decision to permanently contract out the unit work constituted a mandatory subject of bargaining.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Land Air Delivery, Inc., Kansas City, Kansas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(f).

"(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply."

Dated, Washington, D.C. 27 November 1987

Donald L. Dotson, Chairman

Wilford W. Johansen, Member

James M. Stephens, Member
National Labor Relations Board

(SEAL)

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

Case 17—CA—12750

LAND AIR DELIVERY, INC.,

AND

TEAMSTERS LOCAL 41, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

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Naomi Stuart, Esq., of Kansas City, KS, for the General Counsel.

David Leightty, Esq., (Tillford, Dobbins, Alexander and Buckaway), of Louisville, Kentucky, and
Louis J. Amato, Esq., of Bowling Green, KY, for the Respondent.

Michael D. Matteuzi, Esq., of Kansas City, MO, for the Charging Party.

DECISION

Statement of the Case

ROBERT G. ROMANO, Administrative Law Judge: I heard this case on 14-16 April 1986 in Kansas City, Kansas. Teamsters Local 41, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein Local 41, or Charging Party Union) filed a charge on 8 October 1985 (amended 20 February 1986) against Land Air Delivery, Inc. (herein Land Air, or Respondent Employer). The Complaint, which issued on 24 February 1986, (essentially) alleges that the Respondent Employer: (a) on or about 1 February 1985, sub-

contracted to independent contractors the pick-up and delivery of air freight previously performed by unit employees represented by Local 41, without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain as the exclusive representative of unit employees with regard to such subcontracting, and its effects, in violation of Section 8(a)(5) and (1) of the Act; and (b) that since 9 April 1985, Respondent Employer has refused to reinstate 13 named previously striking employees upon their unconditional offer to return to employment, in violation of Section 8(a)(1) and (3) of the Act. Respondent, by Answer filed 10 March 1986, denies the commission of any unfair labor practices; and *inter alia* affirmatively defended in Answer that the allegations are barred by applicable time limitation (10(b)); and it asserts otherwise that the above named individuals, or certain of them, have ceased to be employees of Respondent Employer by virtue of their own (strike misconduct) actions. Respondent also contends in brief the subcontracting issue has been raised by union in a federal district court matter, and consequently this is not the proper forum for resolution of the subcontracting issue.

Upon the entire record, from my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by General Counsel and the Respondent Employer on or about 21 May 1986, I make the following:

Findings of Fact

I. Jurisdiction

Land Air Delivery, Inc. is an air freight motor carrier, with an office and place of business, *inter alia*, in Kansas City, Missouri, whereat it performs the ground portion of air freight shipments to and from airports. Land Air derived gross revenues in excess of $50,000 in 1985 for the

transportation of freight and commodities in interstate commerce pursuant to agreements with and as agent for various common carriers that operate between and among various States of the United States, but principally Emery Worldwide, Inc. (herein Emery). It is clear that Land Air functions as an essential link in the transportation of freight and commodities in interstate commerce; and I find on the basis of the above, and entire record, that Land Air is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. The Complaint alleges and Respondent Employer admits that Local 41 is a labor organization within the meaning of Section 2(5) of the Act.

II. The alleged unfair labor practices

Part One

A. *Background*

1. Land Air Management and operations

Joseph P. Schneller, Sr., is the president and owner of Land Air, an air freight motor carrier. Schneller, Sr. has been in the industry since 1955. However, in 1960 he founded Land Air to provide such service to Emery; and since then, Emery has been Land Air's major customer-client. Land Air handles the ground portion of air freight shipments to and from airports, which is basically pick-up and delivery work. In addition to performing such service in the Kansas City metropolitan area, Land Air apparently operates routes as far west and south as Salina and Wichita, Kansas, and as far east and south as Springfield and Joplin, Missouri. In the conduct of its business Land Air used mostly small equipment, primarily vans and a few pickups, though it also had occasions to use some 1 or 2 ton trucks, and a few tractor trailers. For years, and to

date, Land Air has operated out of Emery facilities located at Prarie View Road, Kansas City, Missouri, though about 5-6 years ago it added its own facilities on the other side of the airport at 10231 North Everton St. It appears that each facility is essentially a dock area where inbound freight for delivery can be broken out and sorted, and where outbound freight is reversely handled. Although president Schneller does keep track of whether the business is profitable, he had not been involved in the day-to-day physical operations for about 15 years. President Schneller now lives in Bowling Green, Kentucky. While Land Air has offices at the Bowling Green airport, Schneller, Sr. also runs a beer distributing business, and a farm in Bowling Green.

Land Air employed Joe Michalski as its general manager of its Kansas City operations from 1981 until about July 1985. At time of hearing Michalski was the subject of a Land Air lawsuit for recovery of certain money purportedly borrowed and owed. Michalski did not testify in this proceeding. Joseph P. Schneller, Jr. (president Schneller's oldest son) took over as general manager on 20 July 1985. Schneller, Jr. had previously been employed by Land Air as a supervisor for 7-8 years, and had been initially employed 4-5 years before that. *Inter alia*, as supervisor, Schneller, Jr., in material times handled payroll. Jack Mawby is a supervisory dispatcher employed by Land Air. Mawby is located at the Emery facilities located at Prarie View Road, Kansas City, Missouri, as were Michaelski and Schneller, Jr. Land Air initially employed Jerry (Jerome) Lynch as a driver in 1977. Although Land Air engaged Lynch (d/b/a Lynch Delivery) as an independent contractor initially in 1979, and continues to do so to date, Land Air has employed Lynch as a *full-time* supervisor at its own North Everton facility since February, 1980. President Schneller, former general man-

ager Michalski, former supervisor and now general manager Schneller, Jr., and supervisors Mawby, and Lynch as well (I find) are supervisors of Respondent Employer within the meaning of Section 2(11) of the Act, and agents of Respondent Employer within the meaning of Section 2(13) of the Act.

2. The Union representatives, and its exclusive majority representative status

Daniel Johnson is Secretary-Treasurer of Local 41. Local 41 employs C. B. "Doc" Conder and Dennis R. Speak as (apparently) business agent, and assistant business agent, respectively, though Conder may have been an assistant business agent during some of the material time herein. Local 41 was certified as the exclusive collective-bargaining representative of the following appropriate unit of Respondent's employees on 14 December 1973:

> All truck drivers and warehousemen employed by Land Air Delivery, Inc. at its delivery service located at Kansas City, Missouri, but Excluding office clerical employees, guards, and supervisors as defined in the Act.

In 1975 Land Air employed approximately 30 employees, including 25 individuals classified as truckdrivers. In the instant proceeding president Schneller testified that Land Air had never employed employees as warehousemen. Otherwise president Schneller testified that the only time he didn't employ contractor drivers was for about a 2-3 month period when he first started some 26 years ago, asserting most carriers use contractors. In any event a dispute arose in 1974 between Local 41 and Land Air over the status of two individuals *viz.*, Dale Cain and Robert Woods. Local 41 petitioned for clarification of the above unit, contending drivers Cain and Woods were employees and should be included. At that time, both Cain and Woods had

worked for Land Air for 14 years. Land Air contended they were independent contractors, not employees, and should not be included in the unit. A hearing was held on the issues. Thereafter, on 16 January 1975, the Board's Regional Director for Region 17 issued a Decision and Clarification of Bargaining Unit, in which, for reasons therein stated, the Regional Director concluded and found Cain and Woods were independent contractors; and, accordingly, the Regional Director clarified the above unit description to specifically exclude independent contractors. (The decision in such matter in Case No. 17-UC-56 (Case No. 17-RC-7343) is officially noticed; and it is in evidence as G.C. Ex. 4.).

3. Additional prior subcontracting and grievance disputes; and related contract provisions

In late 1981, or early 1982, Speak became the agent in charge of presenting grievances and policing the contract between Local 41 and Land Air. The contract in effect at that time by its terms had duration from 1 April 1979 through 31 March 1982. Speak confirmed that the bargaining unit employees that Local 41 represents perform work as an exclusive pickup and delivery agent for Emery, though Speak's understanding was the Land Air also performed such services for Zantop, Inc., an airline servicing mostly parts (delivery) for General Motors. Speak's understanding was that Zantop was the client, but president Schneller has testified more definitively, and convincingly, that General Motors' Leeds facility was actually the client; and that it was Land Air's second largest customer.

Speak more definitively relates that the bargaining unit employees reported daily for work at the Emery dock located at Prarie View Road in Kansas City, Missouri. The unit employees regularly wear uniforms with Emery's name on

it. Although Speak did not know whether Emery owned the uniforms, he knew that Land Air furnished and maintained the uniforms. The unit employees are hourly paid, and they punch a timeclock located in Emery's dock. In material times there were 13 unit drivers, 12 assigned to Emery, and 1 to General Motors' Leeds work. Whether any others, e.g. contractors, performed any other work for General Motors' Leeds facility, is unclear. What is clear is that only one unit employee was involved in that work.

Speak acknowledged that Land Air has operations in cities other than Kansas City; and he further readily acknowledged that work was not done by people in his bargaining unit. However Speak also testified that Land Air does business (from Kansas City) outside the immediate Kansas City area; and Speak claimed from (union) paperwork (records) he had access to, unit employees in the past had performed certain such work, giving as examples runs to Joplin, Springfield, Iola and Sedalia in 1976-78. Speak specifically referred to Land Air contracting out a run to Sedalia; and he related that circumstance to be one involving Land Air actually taking a bargaining unit employee off that run, and putting a contractor on it. However, Speak did not have direct knowledge of the incident. Speak also asserted there was a (later) letter of a former business agent, who was no longer available, but who had a squabble (registered a protest) with Land Air about the subcontracting. There were no prior unfair labor practices filed. The record does not indicate whether the employment status of any unit employees changed.

At hearing, on direct examination, Speak had testified that at the time he first began policing the 1979-82 agreement there were about 12 employees in the bargaining unit, and about 25 people working on *some kind* of contract basis. Speak acknowledged on cross-examination that he

was aware of the unit clarification decision (in regard to Land Air's use of two independent contractors). Respondent established that in an affidavit given 1 May 1985 to a Regional agent, Speak therein stated, "Since that time by 1982 we had about 12 employees on the seniority list and approximately 25 independent contractors." Employer has also submitted in evidence the then applicable 1979-82 agreement, which provided in pertinent part, Article 32, Subcontracting, Section 1:

> For the purpose of preserving work and job opportunities for the employees covered by this Agreement, the Employer agreed that no work or services of the kind, nature or type covered by, presently performed, or hereafter assigned to the collective bargaining unit will be subcontracted, transferred, leased, assigned or conveyed in whole or in part to any other plant, person or nonunit employees, unless otherwise provided in this Agreement.
>
> The Employer may subcontract work when all of his regular employees are working, except that in no event shall road work presently performed or runs established during the life of this Agreement be farmed out. No dock work shall be farmed out except for existing situations established by agreed to past practices. Overflow loads may be delivered by drivers other than the Employer's employees provided that this shall not be used as a subterfuge to violate the provisions of this Agreement. Loads may also be delivered by other agreed to methods or as presently agreed to. Owner-Operators performing subcontracted work which is permitted herein shall receive no less than the wages, hours and general working conditions of this Agreement and the applicable Supplement.

The instant record has made it abundantly clear that subcontracting was a *major* issue in the 1982 negotiations for a new contract. Negotiations between the parties for a succeeding contract covered a period extending (at least) from March to November, 1982. The central issues (eventually) separating the parties were wages, subcontracting and grievance and arbitration machinery. For these negotiations, Land Air's negotiators were general manager Michalski, attorney Amato of Bowling Green, Kentucky, and (later) attorney Dan Denk of Kansas City, Missouri. Both Conder and Speak participated in the negotiations, for the Union. Speak testified that Land Air succumbed to the Union's position; and it took the Union's (contract) clause which expressly forbids subcontracting.

Speak testified relatedly, and General Counsel has presented in evidence (at least) three of the subcontracting proposals that Employer had presented to the Union during their negotiations, one on 31 March 1982, one on 13 April 1982, and a third undated. Each provided substantively:

> It is specifically understood and agreed that the Employer is presently utilizing owner-operators who are independent contractors and not employees of the Employer to perform pick up and delivery work and to supplement its driver employees covered by the terms of this Agreement. This Agreement shall in no way restrict the Employer's use of said owner-operators provided that the Employer agrees that no driver presently employed shall be laid off as a result of the Employer's use of owner-operators. Owner-operators shall not perform dock work if any of the employees presently employed are laid-off.

The Union rejected the proposal each time made; and it maintained its own position that they would settle for

no less than the subcontracting language provided in Article 32 of the National Master Freight Agreement covering Over the Road and Local Cartage Employees of Private Common, Contract and Local Cartage Carriers (herein simply NMFA). Article 32 of NMFA provides in pertinent part.

ARTICLE 32.

SUBCONTRACTING

Section 1.

For the purpose of preserving work and job opportunities for the employees of the signator Employer covered by this Agreement, the signator Employer agrees that no work or services of the kind, nature or type covered by, presently performed, or hereafter assigned to the collective bargaining unit, by the signator Employer, will be subcontracted, transferred, leased, assigned or conveyed in whole or in part by the signator Employer to any other plant, person or nonunit employees, unless otherwise provided in this Agreement. This subcontracting provision is also applicable to the establishment or continuation by the signator Employer of a transportation company or business which engages in the same type of operation covered by this National Master Freight Agreement, which company of business is owned or controlled by the signator Employer. However, the above provisions shall not be interpreted so as to expand the provisions of Article 3 (Recognition).

The Employer may subcontract work when all of his regular employees are working, except that in no event shall road work presently performed or runs established during the life of this Agreement be farmed out. No dock work shall be farmed out except for

existing situations established by agreed-to past practices. Overflow loads may be delivered by drivers other than Employer's employees provided that this shall not be used as a subterfuge to violate the provisions of this Agreement. Loads may also be delivered by other agreed-to methods or as presently agreed to. Owner-operators or other persons performing subcontracted work which is permitted herein shall receive no less than the wages, hours and general working conditions of this Agreement and the applicable Supplement.

The record herein reveals that on 9 November 1982 Local 41 and Land Air reached an impasse. The parties were at impasse mostly on subcontracting, but also on acceptable grievance machinery. The Union struck to enforce its demands. The strike lasted 3 days at which time on 12 November 1982, Land Air signed an interim agreement accepting the NMFA, with certain wage and grievance exceptions (but evidencing no exception as to the subcontracting clause). Those excepted areas were further negotiated by Condor and Speak, and attorney Denk. Insofar as pertinent, Land Air's attorney Denk confirmed their agreement on grievance procedure by letter dated 17 November 1982:

> 2. Grievance Procedure — It was agreed that grievances would be handled by the Cartageman's Association Grievance Committee as opposed to the present committee hearing the Land Air Delivery grievances.

Speak further explicated that it had been agreed the grievances would be heard at the Greater Kansass City Public Warehouse Joint Grievance Panel as the first step; and that any *decision* reached there would be final and binding. Condor confirmed by letter dated 22 November 1982, in pertinent additional part:

> . . . In addition we agreed that in the event a grievance was deadlocked at this committee the company may elect at any time following to notify the Union that it does not wish to process the grievance through any further committee steps, in which case the Union would be free to resort to economic recourse notwithstanding any other provisions of the agreement.
>
> (Both earlier interim agreement and NMFA provided otherwise for certain no strike undertakings.)

Speak summarized (seemingly in regard to deadlock) the Company had the right to take it to the next step, or, refuse to do so; and the Union could then strike to force it to do so. Speak also testified that Land Air had not only succumbed to the Union's position on subcontracting, but that *general manager Michalski had promised faithfully to return* that (previously subcontracted) *work to our bargaining unit by attrition.* Speak testified that Michalski first said that to Conder in Denk's office; and that general manager Michalski repeated it to Speak in front of union steward Mike Carleton in a meeting held at Shoney's Restaurant, shortly after the signing of the contract, in late 1982, or early 1983. Although Speak acknowledged the promise of Michalski was not reduced to writing, Speak also testified that he believed attorney Denk would verify it. Neither Michalski or attorney Denk testified on this matter; and there is no direct evidence offered to the contrary. I credit Speak as to Michalski's stated promise to him. I futher credit Speak's testimony that Michalski subsequently added one employee to the bargaining unit (Bill Greenfield) but only through grievance machinery, in late 1983, or early 1984. However, it is also apparent *infra*, that Employer asserts it put (at least) three individuals under original contract in this period, *viz.* Mark Rinehart, February 1983; Russell Sloan, December 1983; and Bill Haney, August

1984.) There is no evidence offered that any of them then performed unit work. It is clear that the parties had agreed to and that their applicable subcontracting clause was Article 32 as contained in the NMFA, and that that contract (and its terms) had duration from 1 March 1982 *through 31 March 1985*. It is also clear that the issues presented here relate only to the status of some 13 Kansas City (local) divers whom Local 41 represents.

B. *The Evidence*

1. The cause of the Strike on 13 November 1984

At about 6 a.m. on 13 November 1984, Speak, Land Air employee and union steward Walt Malinowski, and Dave Evans, a nonemployee but member of Local 41, drove to Land Air's Emery facilities. Speak hand-delivered a letter to Land Air dispatcher Mawby. The letter, dated 12 November 1984, related that it gave general manager Michalski 72-hours notice that pursuant to Article 8, Section 2 of NMFA, Local 41 had authorized strike action for Land Air's failure to comply with certain earlier grievances decided in favor of the Union, *viz.* 25 July 1983 grievances, the "Frank Martin" grievance and the "Jim McDonald" grievance. The letter however went on to state:

> The seventy-two (72) hour notice contained herein is not related to any economic action we might take in response to your action in choosing not to process deadlocked grievances to further committee steps. As you are aware, when the Company chooses not to further process a deadlocked grievance, we have the right to take economic recourse without notice as outlined in Conder's November 22, 1982 letter to your attorney Daniel B. Denk. For example, Land Air chose not to proceed to the further steps of the grievance procedure with respect to the deadlocked "Lonnie Thatcher",

> grievance. Therefore, we reserve the right to take economic action without notice to support our position in the Thatcher grievance.

Speak testified that all the unit employees commenced a strike on 13 November 1984. According to Speak the strike was caused by the grievances of McDonald and Martin, and the (deadlocked) Thatcher grievance; and that the reason for the strike was Land Air's, "Failure to abide by the grievance decisions and failure to take it to the next step." Speak clarified on cross-examination that he had not testified that striking was the Union's only recourse at the time; and he acknowledged another recourse was an action in court to enforce the collective-bargaining agreement. The alternate procedure of pursuing a court enforcement of favorable grievances did not preclude a strike over the deadlocked Thatcher grievance.

Respondent has established that in an Employer suit, the Union has filed counterclaim seeking enforcement of certain grievances. In that regard, the parties have agreed that Union's counterclaim seeks enforcement of three grievances, at least one of which refers to subcontracting. Briefs have been filed and decision is pending on the Union's counterclaim, Employer's base claim having been already resolved favorably to Employer. The instant case does not involve resolution of any grievances. The details of the above grievances are not even in evidence. Nonetheless Employer has advanced general argument that since (at least) one of the grievances involves subcontracting, the Board is not the correct forum to handle any issues herein involving subcontracting. President Schneller (essentially) acknowledged that Local 41 was free to strike without notice over the deadlocked "Thatcher" grievance, and Land Air's (thus admitted) refusal to proceed to further grievance step for its resolution.

2. The Strike in nature and origin was a lawful economic strike over prior grievances

On 13 November 1984 the following 13 named employees,[1] who collectively constituted the entire unit of employees then (unquestionably) represented by Local 41, ceased work concertedly and (I find) engaged in a lawful economic strike, over the prior grievances:

Carleton, Mike	Greenfield, Bill	Malinowski, Walt
Cundiff, Lindsay	Gunn, Walter	Stevens, Don (Ron)
Fincher, Joe	Guyton, Dale	Thomas, Dave
Farris, John	Harring, Ken	Vest, Norman
	Koehn, Jerry	

The Union and unit employees picketed Employer's facilities, principally the Emery facility that Land Air employees used. The Union, the striking employees and certain nonemployees, but union members also engaged in ambulatory picketing. In November, and the following month of December Employer contends that all of its above striking employees engaged in various acts of misconduct. These allegations, and their circumstances are handled in Part Two of this decision. Suffice it to note here there was violence, and threat of violence, by certain individuals. The strike lasted five months, from 13 November 1984 to 9 April 1985.

3. The immediate replacement of strikers; the varied nature of replacements

President Schneller was in Bowling Green when the strike began. He had no prior notice of the strike before receiving a call that Local 41 had served a letter; and that a strike had begun. As noted Schneller acknowledged that

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[1]The names of employees appear as reflected in Respondent Employer's records.

Local 41 didn't have to give prior notice of its strike over the deadlocked grievance that Employer elected to refuse to process further. Schneller did not immediately go to Kansas City. He called his attorney on what to do, and about his obligations. Emery's business is rapid delivery (usually) of small items, packages or envelopes. The normal morning freight was already there. Land Air had contractual obligation with Emery to get their stuff (sic) handled; and there were also deadlines that Land Air had to meet in doing it. Schneller explained that Emery is involved in a very competitive business. People pay a $10-$15 premium for rapid delivery of parts (and more recently) documentation. Time is of the essence; and the quicker you get the item delivered, the better. At this time certain areas of the city had to be delivered by 10:30 a.m., and others by 12 noon. If Land Air consistently failed to meet the established time limits, Emery would get someone else. Schneller testified that he was sure Emery was sympathetic, but they primarily want their freight delivered.

After speaking with his attorney, president Schneller told them (local management, and presumably Michalski) to just do whatever had to be done; and to do the best we could. Schneller testified that Michalski had the primary responsibility of getting and interviewing replacements. However, Schneller testified in general that to do the work that had to be done we got anybody we could. According to Schneller, with a picket line up its hard to get people to work under the conditions you got; but they had gone through a strike previously and they handled it the same way. They hired people to put in Land Air's equipment. There are also contractors who work around the airport for themselves. According to president Schneller they tried to get everybody that had their own truck and worked for themselves to work for us and do the job; and they got

(some unidentified) people with their own equipment, cars and pickups. Land Air also used people out of the office (e.g. supervisors). Schneller, Jr., at the time a supervisor, confirmed that he didn't find out about the strike until he drove on the premises; and that they hustled up everyone and anyone they could to perform the services for Emery. Supervisor Schneller, who regularly paid them, testified that in a week or so they had hired drivers as employees, on contractors, or (used) supervisors. Land Air apparently also at first brought some (people) in from Joplin (Missouri) and Wichita (Kansas). They used some wives, and brothers of drivers. They drove Land Air Equipment.

President Schneller testified they used everybody; and it was not part of a scheme to do away with the bargaining unit. The only scheme was to get the Emery freight delivered. We had to get it done, or Emery would get someone else to do it. They (Emery) are not going to be bothered with our (Land Air) problems. Michalski had the responsibility for hiring employees and independent contractors; and president Schneller presumed that he did most of the interviewing, as that was his primary responsibility.

President Schneller confirmed that prior to the strike Land Air had done business with General Motors' Leeds facility. At a point early in the strike Land Air ceased performing that work. General Motors cut off the business as they did not want Land Air out there because the pickets would come out there, and they did not want their business interrupted. President Schneller testified, and Speak earlier had acknowledged, that Shock Transfer, a competitor of Land Air is now doing that business; and that Shock Transfer employs (only) driver employees, who are represented by Local 41. However, Speak's testimony that (only) one Land Air unit employee had been pre-

viously assigned to do this work, does not appear to have been contradicted by Employer.

4. Land Air's notice of contract termination

By letter dated 28 January 1985 from president Schneller and attorney Amato, Land Air gave Local 41 the following notice:

> This letter hereby gives written notice, pursuant to Article 39 of the current National Master Freight Agreement with the Central States Area Local Cartage Supplemental Agreement, that Land Air Delivery, Inc. desires to cancel and terminate the Agreement in effect from March 1, 1982 to and including March 31, 1985, and hereby does so.
>
> This letter will further advise that Land Air Delivery, Inc. will not be a member of any Employer Association or any Employer Bargaining Group in the negotiation of a new contract. Land Air Delivery, Inc. will not be bound by, or in any way obligated by, the terms of any Agreement which may be negotiated by an Employer Association.

Although the above letter on its face is susceptible of an interpretation of an intended immediate termination of the existing NMFA agreement with Land Air, I conclude and find the reference to duration of the contract, and to Article 39 would appear to clarify Employer understanding the contract's effective duration remained through 31 March 1985.[2] Moreover, president Schneller acknowledged at

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[2]Article 39, Duration, Section (1) provides: "The Agreement shall be in full force and effect from March 1, 1982, to and including March 31, 1985, and shall continue from year to year thereafter unless written notice of desire to cancel or terminate the Agreement is served by either party upon the other at least sixty (60) days prior to date of expiration."

hearing that the contract did not expire until 31 March 1985.

5. The independent contractors

a. *Records of current contractors, and their initial contracts*

In response to General Counsel 20 December 1985 subpoena calling *inter alia* for Respondent's record of current independent contractors and date of original contract, or in lieu thereof a compilation, Respondent supplied (in part) a pertinent compilation on the original dates. (The Employer's response was introduced as G.C. Ex. 7.) According to Respondent's records, Respondent's independent contractors as of 20 December 1985, and with month and year of original contract are:

October, 1976	Griffitts, Dick
June, 1978	Thatcher, Lonnie
February, 1979	Smith, (William) Ken
July, 1979	Lynch, Jerome
February, 1983	Rinehart, Mark
December, 1983	Sloan, Russell
August, 1984	Haney, Bill
February, 1985	Benefield, Don
February, 1985	Horton, Kenneth
February, 1985	Fowler, Donald
February, 1985	Pope, Tom
March, 1985	Mawby, Jack

Respondent also answered in its compilation that it had no records reflecting the names or dates of employment of any employees of the above named contractors. Respondent however related that a survey of the contractors indicated that as of 1 November 1984, the contractors then had 12 full-time and 1 part-time employees. Thus, in sum, not the 25 contractor and/or contractor drivers Speak in this record state appears to have off and on again recalled, but at most 19-20, though not all contractors drove, all the time.

The latter number is however, very compatible with the certain daily reports contained in G.C. Ex. 6, discussed further *infra*. As of 15 December 1985, the contractors surveyed reported they then had 18 full-time and 3 part-time employees. (The evidence reflects an overall substantive change of 6 full-time and 2 part-time employees employed by current contractors in period from shortly before strike to 15 December 1985.)

Speak confirmed that there were independent contractors that did some work at Emery, that (at least) some themselves did employ employees, some part-time. Speak could not tell by observing the Emery dock how many drivers are employees of independent contractors. Speak knew personally a few of the contractors and their employees, but he did not know how it was otherwise; and that they all wear Emery uniforms.

i. *The informal settlement in Case No. 17-CB-3006.*

Land Air filed a charge against Local 41 in Case No. 17-CB-3006. On 4 February 1985, Local 41 entered an informal settlement agreement which contained a nonadmission clause, and also a Notice to Employees and Members that it would not engage in coercive acts in general, and certain specified coercive acts, including various threats of bodily harm, or damage to property; and/or engage in certain acts of damage to property; blocking ingress or egress; following employees to and from picket line driving in a dangerous or reckless manner; or in any like or related manner restrain or coerce Land Air employees. Respondent has introduced a copy of said informal settlement into evidence without General Counsel objection. (Employer did not join in the settlement.) The agreement was approved by the Board's Regional Director on 28 February 1985. The General Counsel would have it observed that no evidence was presented of any union employee or member

misconduct on, or after 4 February. None is presented in this record.

b. *The February-March, 1985 (independent contractor) contracts*

President Schneller testified that he did not have the number of contractor drivers, or owner operators who worked out of Kansas City, before, or after the strike. At the outset it is to be noted that General Counsel does not contest the status of Land Air's contractors as independent contractors. Neither did president Schneller know the last date (day) that Land Air had employed employees (as opposed to all contractors). General manager Schneller, Jr. testified that Land Air keeps *no* records of employees that the independent contractors have, though he acknowledged they took a count at one time. Although Schneller, Jr. testified that he would make the decision on whether another contractor should be hired, he asserted that he hasn't had to make that decision. However, Schneller, Jr. has acknowledged that either he, or Mawby make the current decisions as to whether or not to *increase the volume of business* that is given to the independent contractors. Schneller also testified that he didn't know *for sure* if any of the contractors have hired new employees since *9 April* (when employees offered to return to work unconditionally, to be discussed *infra.*) This is however difficult to fully accept, since Schneller, Jr. regularly paid the contractors for the work they and their drivers performed. Employer kept daily records of the revenues generated in the service of its principal customer Emery. Some of those records are in evidence, see e.g. G.C. Ex. 6, a series of 21 such records. Those records, limited though they may be, not only show revenues generated in deliveries for Emery, but they also show, at least in significant part for present purpose, the pickup and deliveries by certain contractors and by certain

drivers as related to certain contractors. I am constrained to conclude therefrom that if Schneller, Jr.'s referenced "for sure" has not indicated a mental reservation he had in his complete denial, his complete denial itself exhibits a reluctance to candidly respond as to what he did know, e.g. from these records.

The General Counsel has placed in evidence twelve contracts executed by Land Air contractors in February-March 1985. Not Michalski, but Schneller, Jr. (then supervisor) signed each such contract on behalf of Land Air (though without his title being expressed). The aforesaid December 1985 listed current contractors are the same 12 contractors under contract as of February-March 1985. Each such contract provided the contractor would be paid 75% of gross. Each such contract has an addendum acknowledgement of receipt of certain equipment into Land Air's service, which in each instance is acknowledged by supervisor Jack Mawby. Each contract contains a signatory page with a place for signature of the contractor evidencing agreement to the contract, but also a place on that same page for a dated (second) signature acknowledging receipt of a fully executed copy. In the body of the agreements there is statement that the agreement is made on 20 February 1985, though in Mawby's case it is stated as made on 1 March 1985. All twelve contracts bear contractor signatures evidencing their agreement to the contract's terms. All twelve contractors signed the acknowledgment of receipt of a fully executed copy. Though nine have not dated that acknowledgment, three have, namely William K. (Ken) Smith on 20 February 1985; Tom Pope on 22 February 1985; and Jack Mawby on 1 March 1985. No other evidence is presented as other date of execution. On weight of the above evidence (as presented) it is concluded and found that Pope executed his contract on 22 February; that (supervisor) Jack Mawby executed his contract on 1 March 1985; and that the other 10 contractors executed their above contracts on or about

20 February 1985. However, from Employer's own formal and compiled report as to original date of contracts, it is apparent, and I find, that five had *not* previously been under contract, namely Benefield, Horton, Fowler, Pope and supervisor Jack Mawby.

President Schneller offered testimony in explanation of the execution of these contracts in February-March on the general basis that something had happened in a court case somewhere, and Employer's attorney had drafted a new contract; that he was not involved in it; and that Land Air changed them (contracts) with anybody we had. Although president Schneller related he would imagine each (contractor) had, or should have had one contract earlier, it is apparent from the supplied data compilation from Employer's own records that was not the case as to the above five. *Inter alia*, each such contract also contains the following paragraph:

> 13. As required by the Interstate Commerce Commission Lease and Interchange regulations, this Agreement shall continue in effect for a period of thirty (30) days from the day and date first above written, and thereafter continuously unless cancelled by either party by thirty (30) days written notice.

Upon review of the aforesaid 12 contracts, president Schneller identified only five that he personally *knew* had been independent contractors before the strike. (They are reflected below by asterisk.) The General Counsel however appears to concede in brief that the record will support two others, namely Russell Sloan and Bill Haney as hired by Land Air as subcontractors before 20 February 1985 (presumably) satisfied with support for the Employer reported dates of December 1983 for Sloan, and August 1984 for Haney. In any event, on evidence presented of record, it is so found. The aforesaid 12 contracts, with equipment referenced as then placed in use are:

Name	Equipment (No. & Type)	Name	Equipment (No. & Type)	Name	Equipment (No. & Type)
*Griffiths, Dick	2 Vans	Sloan, Russell	4 Vans, 1 Pickup	Benefield, Don	1 Two Ton Truck
*Thatcher, Lonnie	2 Vans	Haney, Bill	1 Pickup	Horton, Kenneth	2 Vans
*Smith, Ken	3 Vans			Fowler, Donald	1 Van
*Lynch, Jerome d b a Lynch Delivery	1 Van			Pope, Tom	1 Two Ton Truck
*Rinehart, Mark d b a M.K.T.	5 Vans, 1 Pickup			Mawby, Jack	2 Vans
Total Eqpmnt	14	Total Eqpmnt	6	Total Eqpmnt	7

This is not to say I am without reservation in certain of these equipment findings, particularly in regard to the extent of Sloan equipment, chiefly because G.C. Ex. 6 series of dates of service would not support use of that much equipment by contractor Sloan in Land Air use, at least much before the end of June. However, G.C. Ex. 6 was offered definitively for other purpose, is far from a complete daily list; and it does not address many intervening days. On the other hand Employer conceded in brief that Roger Williams, who testified he was hired and employed by Sloan for a week before being employed by Thatcher, also testified that while he was employed by Sloan and Thatcher, both had *no* other drivers working for them.

The General Counsel does argue in brief that Employer's employment records are incomplete and contradictory at best. Employer confirmed at hearing (and see G.C. Ex. 7) that Employer had hired (at least) eight (8) employees after the strike, and that these eight continued to be employees of Employer until date stated. Shown in order of date of hire, secondly by date of termination, and alphabetically otherwise, they are:

Name	date hired	date terminated
Mawby, Janice	19 Nov. 1984	28 March 1985
Epperson, Edward	21 Nov. 1984	20 Dec. 1984
Hodges, Mark	21 Nov. 1984	20 Dec. 1984
Horton, Bob	21 Nov. 1984	20 Dec. 1984
Ellis, James	21 Nov. 1984	28 March 1985
Horton, Ken[5]	21 Nov. 1984	28 March 1985
Lynch, Jack	21 Nov. 1984	28 March 1985
Fowler, Donald[6]	13 Dec. 1984	28 March 1985

It is apparent from the above that Employer had terminated three of the eight on 20 December 1984; and that it terminated all the remaining five employees on 28 March 1985. Employer offers no explanation for its termination of these 5 employees on 28 March 1985. Moreover, the

asterisk above denotes two (purported) employee drivers who had (purportedly) signed independent contractor contracts with Employer on 20 February 1985, thus over a month earlier than their termination as employees on 28 March 1985. These two individuals do not appear with *contractor* designation on 27 February 1985, though they do on 20 and 29 March 1985 (See G.C. Ex. 6 series). Two others, not listed as hired employees, Pope and Benefield similarly do not appear with contract designation on 27 February 1985 (though also purportedly independent contractors as of 20 February 1985); and they do appear with contractor designation on 20 and 29 March. Benefield however had worked earlier for Employer on 7 December 1984. It must be, and is included there is inconsistency, if not outright contradiction in Employer's records on employee vis-a-vis independent contractor status, which Employer has not adequately explained.

Respondent's witness Michael Lawrence Reynolds testified specifically that he was hired in October, 1982; that since then he and Griffitts drove (Griffitts') two vehicles; and that Griffitts didn't hire *anymore* employees. Respondent's witness Roger Williams testified specifically that he was initially hired by Sloan on 19 or 20 November 1984, but worked less than a week for Sloan; that he was then employed by Thatcher; and that thereafter only he and Thatcher drove (Thatcher's two vans). No employee of Ken Smith (apparently) testified; and president Schneller could not recall if Smith was a contractor who did not drive himself for a period, but had come back to driving (during the strike). From testimony of Respondent's witness *Jimmy* Allen McDonnell, it is apparent that McDonnell in material times (indeed from June-July 1984 on) regularly drove Lynch's *one* vehicle. Lynch was a Land Air full-time supervisor all along (since 1980). It is thus clear from weight of evidence of record that during the strike, and

thereafter, Lynch drove regularly and substantially. It is as readily apparent that when Lynch drove, he drove Land Air's equipment, while still employed as a full-time Land Air supervisor; and he did so after the striking employees' unconditional offer to return. Respondent's witness David Andrew Nelson testified that he was employed by M.K.T. 3 days before the strike; and Nelson testified that shortly after the strike he drove striking employee Walter Gunn's route, and continued to do so as of hearing date. Nelson did not testify as to other drivers of contractor Rinehart d/b/a M.K.T.. However it is clear Rinehart had six vehicles contracted in Land Air use. On 26 November 1984, the first such daily record available (G.C. Ex. 6 series in evidence) in addition to Mark Rinehart himself, five other drivers are listed in association with Rinehart contract *viz.*, Nelson, Green, Craig, Anderson, Barb. It is thus indicated that Rinehart had six vehicles in use for Land Air at that time. Whether such was an expansion of his subcontract service, and the degree of same on unit work is not specifically apparent.

Prior to the strike Land Air owned the trucks (mostly vans), driven by unit employees. According to president Schneller most of them have now been sold. Schneller acknowledged some were sold to (unidentified) contractors, some were junked, or sold to truck dealers; and a few have been retained. Schneller however confirmed the latter are presently used *by supervisors*, and as spares for the contractors. (The exact number remaining does not appear of record.) Schneller also testified that, as before, supervisors occasionally work the trucks, when needed. President Schneller however acknowledged at times in the past he had had union grievances filed when supervisors previously worked the trucks. *According to president Schneller, Land Air presently has no employee drivers working out of Kansas City; its all contracted out.* Schneller ac-

knowledged there are (Land Air) employee driver replacements who are now working as contractors, though he asserted he did not know their names. However he knew that one of the driver employee replacements, James Ellis, remains, but asserted he is employed as a supervisor. According to Schneller, Ellis supervises the Emery work at night. Schneller testified that Ellis also performs some light maintenance, mechanical work. Schneller however has also acknowledged that Ellis also sometimes does pickup and delivery work.

According to president Schneller, the employee driver replacements (who are now contractors) had previously said they would rather work as contractors. On direct he had testified that they had asked *him* about it. (On cross-examination he testified they had asked Michalski.) Schneller talked to his attorney. The attorney talked to management there (Kansas City). They then did what they did; *viz.* put them on as contractors. (No former employee and now contractor corroborated president Schneller.) Schneller testified it was before the employees offered to return to work. At best it is arguably but shortly before 20 February 1985 because one of the factors President Schneller asserted he considered was a reduction in security expense by virtue of contractors taking their vehicles home. In that regard, Respondent Employer had paid (partially, with Emery) for night security of parked trucks, for *3* months, thus into February, 1985.

Speak has testified that at no time during the period when the 1982-1985 collective-bargaining agreement was in effect did Land Air notify the Union that it wanted to bargain concerning subcontracting unit work; nor did it bargain with the Union during that period. Clearly that testimony encompasses that Respondent Employer never discussed with the Union its intent to subcontract out *all* unit work, *permanently*. I conclude and find Employer

clearly had not notified the Union, or any employees, before 9 April 1985 that all unit positions had been permanently subcontracted.

6. The unconditional offers to return to work

a. *The oral offer*

At 6 a.m., 9 April 1985, Speak and all unit employees, except Joe Fincher and Walt Malinowski whom Speak relates were working that day, met at a local restaurant and discussed the subject of an unconditional return to work. At 7 a.m. Speak and the above unit employees drove to Emery's dock. Speak remained on the street as the unit employees went to the dock. A few minutes later the employees left the dock area and went to an adjacent lot. One of the employees informed Speak that they had been informed to wait in the lot until they (local management, but otherwise unidentified) spoke to their lawyers. Speak joined the employees in the lot.

At 8:30 a.m. general manager Michalski, accompanied by a Company lawyer (Rod Turner) came out to the group. Michalski asked Speak if he was the spokesman. Speak replied he was. Michalski inquired of Speak if Speak was agreeing to return to work unconditionally; and Speak replied, yes, we was (sic) going to return to work without conditions. Michalski said there would be no work today. (On cross-examination Speak confirmed that during their conversation Michalski had told Speak, "I didn't know you all would be offering to come back to work." Speak in the same conversation asked, "What about tomorrow?" Michalski replied his answer stood, there would be no work today. Michalski then inquired if there had been any changes in (employee) address or telephone number. Two unit employees, Ron Stevens and Bill Guyton responded, giving their changes. After obtaining the changes, Michalski re-

peated "There's no work today. This meeting is over." Michalski walked back into the building. Employer did not seek clarification on the absence of Malinowski and Fincher from the group. Employer also did not inform the Union that *all* unit work had been contracted out, let alone permanently contracted out.

b. *the written offer*

Speak did not hear from the Employer that day, or the next day, 10 April. Although Speak at one point testified that he wrote Employer a letter requesting information concerning them (Land Air) hiring employees and subcontracting our work, Speak acknowledged on cross-examination, and it is otherwise clear in the record that a request specifically on subcontracting information was not made of Employer until 3 June. By letter dated 11 April 1985, addressed to Michalski, and sent by certified mail, Speak wrote Employer:

> This is to inform you that as of April 9, 1985, we have agreed to return to work at Land Air Delivery without conditions.
>
> Please be advised that our complete seniority list has been and still is available for work.

It is concluded and found that on 9 April the Union made an oral unconditional offer to return on behalf of *all* unit employees; and that, in any event, on 11 April Speak confirmed the unconditional offer to return was on behalf of all unit employees, in writing.

Speak also again sent the unit employees to return to work, with union steward John Farris as spokesman. Respondent established that in prior statement, Speak stated he was later informed that the men were (again) told there was no work for the day; but he was also told that the employees were told they should stay off the Company's pro-

perty. Whether this incident occurred before or after, as to which the evidence appears ambiguous, though before would appear more likely, in any event, Local 41 filed a charge against Land Air on 11 April 1985.

7. The first unfair labor practice charge; union refusal to withdraw and dismissal.[3]

In this charge docketed as Case No. 17-CA-12654, Local 41 alleged that Land Air had violated Section 8(a)(1) and (3) in that:

> Since on or about April 9, 1985, the above named Employer, . . . refused to return to work unfair labor practice strikers who unconditionally offered to return to work and since such date has refused to return to work said strikers, all because said strikers engaged in an unfair labor practice strike on behalf of Teamsters Local No. 41, against the above-named Employer.

President Schneller has testified that when the employees made their offer to return to work, the Company had no work for them to do; and he referred the whole matter to the attorney. The attorney advised Schneller that we couldn't discriminate against taking them (employees) back, but right now they had been replaced; and if we had any openings that they'd have to be considered and (it) not be held against them that they were - just because they were on strike. The attorney also talked to president Schneller about the effect that upcoming collective-bargaining might have on whether we would be taking some of the employees back, or giving them some work that was currently being done by contractors. The attorneys were going to negotiate that; and president Schneller relates, I wouldn't get in-

[3]This charge was apparently amended, but in what respect does not appear directly of record.

volved in that. It is clear to me from context president Schneller's intended meaning was that his attorney(s) were to handle such negotiations for him. It is equally clear to me and I find that Employer had internally adopted the position that the former striking employees had been *all* permanently replaced by contractors; but also, *internally* had not precluded a return of certain unit positions, by negotiation (e.g. by subcontract cancellation).

Following investigation the Regional Director for the Board's Region 17 dismissed the aforesaid charge (as amended) concluding that further proceedings were not warranted, and reciting therein *inter alia:*

> . . . From the evidence disclosed by the investigation, it appears that the collective-bargaining agreement in effect at the time of the Union's strike which commenced on November 13, 1984, provided that in the event a grievance deadlocked at the Cartagemen's Association Grievance Committee level, the Employer could exercise its right to refuse to process a grievance further. Under this provision, the Union can then resort to economic recourse notwithstanding any other provision of the collective-bargaining agreement. The investigation revealed that the strike which commenced on November 13, 1984 was in fact prompted by the Employer's refusal to process further a deadlocked grievance involving a driver. In addition, it was noted that in its correspondence to the Employer announcing the strike, the Union notified the Employer that it was taking "economic action" against the Company.
>
> Under these circumstances, it appears that the subject strike was an economic strike giving the employees the right to reinstatement only at such time when positions become available. In this regard, it does not appear that the Employer has hired any employees since the Union's April 9, 1985 unconditional offer to

return to work. Therefore, the Employer's refusal to immediately reinstate its striking employees is not a violation of the Act. . . .

There is no reference to Employer having subcontracted all unit work permanently.

8. The request for information on subcontracting; interim employee communication with Schneller, Jr.; and strike resumption.

a. *request for information*

Local 41 did not withdraw the charge, but neither did it appeal the Regional Director's dismissal of the charge. Rather, by letter dated 3 June 1985, Speak wrote Michalski making the following further inquiries:

> Would you please respond to me as soon as possible if you have hired any new employees since April 1, 1985.
>
> Also are you subcontracting any of the work previously performed by our Bargaining Unit employees prior to the strike?
>
> If you need any further questions answered concerning these questions please contact me.

Speak (essentially) acknowledges this was the *first* inquiry he had specifically made about the subcontracting of the Employer. By letter dated 5 June 1985, Michalski acknowledged receipt of Speak's letter, and advised Speak it had been forwarded to Employer's attorney. By letter dated *10* June 1985, attorney Amato, who had not been copied with charge dismissal letter wrote Speak, and advised:

> Since your questions involve matters directly relating to a pending case before the N.L.R.B. I don't feel

that it would be appropriate for me to discuss these matters at this time.

In point of fact the charge had been already dismissed on 21 May 1985; and the period for filing an appeal had well run out by 10 June. Speak testified credibly that Land Air did not answer (and I find Employer did not timely answer) the questions Speak had asked in his 3 June letter. While it is apparent that Speak did not seek any immediate clarification of the Amato letter's erroneous reliance on the charge still being under investigation, it is apparent that Amato had sent copy of his letter to both Schneller (presumably president Schneller) and Michalski. Assuming Amato was not aware of the earlier dismissal, it is difficult for me to accept he would not have soon thereafter become aware of it. The fact is no clarification of position on the subcontracting was timely forthcoming from Employer, though Speak had specifically requested it.

b. *The conversations between employee Cundiff and Schneller, Jr.*

Schneller, Jr., testified that at 7:28 on 10 June (thus while Schneller was still supervisor) he had a phone conversation with employee Lindsay Cundiff (a former striker). In that conversation, according to Schneller, Cundiff said that 90% of the men who worked at Land Air just wanted their fair settlement of vacation time and sick days that were owed to them by Land Air. Cundiff told Schneller, Jr. that as far as we was concerned the whole thing was over, but he did not know the Union's position on this matter. —Supervisor Schneller told Cundiff we have to check with the attorneys. Cundiff said he did not want the uniforms Land Air had provided him, just the pay that should be coming to him. According to Schneller, Cundiff also said that he was working then; and that he would deny this

conversation ever took place. Cundiff gave Schneller a phone number were he could be reached. Schneller relates that a few days later, on 13 June 1985, at 7:30 a.m., Cundiff called Schneller, Jr. back. According to Schneller, Cundiff this time said all of the former employees wanted their settlement on their vacation and sick days immediately because they knew it was over. Cundiff told Schneller that the Union's basis for delaying this is to recover backpay. Cundiff said all of the former employees felt this way, except Joe Fincher, because they (the other employees) did not want anything to do with him. According to Schneller, Jr. he told Cundiff that he still had not heard from his attorneys. There is no evidence that Employer at this time sought any clarification on Union's prior offer on behalf of all employees to unconditionally return to work. What is only apparent is that on the same day as Cundiff's first conversation, Amato sent his nonresponsive letter to the Union.

Cundiff was called as a rebuttal witness by General Counsel. Cundiff confirmed he had two phone conversations with Schneller, Jr., and that he placed the calls. Cundiff testified that he was concerned about his vacation time; and that in the first conversation he asked Schneller, Jr., about vacation time that he felt was due him. According to Cundiff Schneller told him he would get with the lawyers, and to call him back in a couple of days. Cundiff did call a second time; and according to Cundiff, Schneller told Cundiff this time that the checks were in the hands of the lawyer and that's all he knew. Cundiff asserted that was the end of the conversation.

Cundiff otherwise specifically denied that he told Schneller that all he wanted was his money, and that he didn't want to come back to work; and he specifically denied that he said that all that any of the other strikers wanted was their money, and that they didn't want to come back to

work. Cundiff denied that there was any discussion of sick leave. (It appears that as of July the Union was claiming as due to Cundiff: $1,541.54 for *pro rata* vacation earned through 12 November 1984; $305.76 for 3 days sick pay; and $101.82 for 8 hours worked on 12 November 1984, the day before the strike. By answer of Amato letter of 22 August 1985, Employer contended that Cundiff had been paid on 17 November for the work on 12 November; confirmed the amount of the vacation pay then due; and contended otherwise that Cundiff was due only 2 days sick leave benefit of $203.84. There were other disputed claims. If such claim disagreements appear inconsistent with Cundiff recollection of Schneller, Jr. assertion the checks were in the hands of the attorneys, no more does Employer's assertion that all the employees no longer wanted to return appear inconsistent with Amato's response to requested negotiations at this time, and resumption of strike activity on 22 June 1985.

c. *the strike resumption*

On 22 June 1985, Local 41 went back on strike; and according to Speak this time they began to stay at the Emery facilities. Speak has testified they observed new employees come and go whom they had not seen before. Speak asserted that prompted the Union to file the new (instant) charges. However, as noted, the new (instant) charges were not to be filed until 8 October. There is some evidence (in G.C. Ex. 6 series) to support Speak's reported observations, *viz.*, an apparent appearance of new contract driver names in June, July and August. At least as of time of renewed strike, Employer could not doubt continued interest in return to employment by its unit employees.

9. Negotiations and correspondence

By letter of 1 July 1985 to Conder, attorney Amato acknowledged receipt of an earlier letter of *18* June 1985 from Local 41's secretary-treasurer Johnson designating Conder as a member of the Union's subcommittee for negotiations. After presenting the details of his existing schedule for the month of July, looking to mutual agreement on a date to begin negotiations, Amato requested that the Union's proposal, if available, be submitted prior to the meeting to be arranged. Though Speak had a recollection at one point that there were a number of letters between Johnson and Amato as to which Speak has asserted Amato could not make the meetings with Johnson, none were introduced. Moreover, Speak later acknowledged that Conder had the negotiations; and Speak was not aware of any direct letters, or phone calls between Conder and Amato. Conder did not testify. Conder did reply to Amato, but on this record, in September. Other matters were being pursued by the Union in the interim.

Local 41's attorney Michael A. LeVota wrote a letter dated 16 July 1985. Therein, in addition to requesting that certain vacation and other (sick leave) benefits payments be made to the thirteen unit employees, LeVota requested:

> We hereby request that you provide us with the employment status of each and every member with Land Air Delivery, Inc., hereinafter referred to as the "company" and pursuant to 290.140 R.S. Mo. 1982, provide us with the effective date of their layoff status or termination.

By letter dated 22 July 1985, Joe Schnell, Jr., acknowledged receipt of the above letter on that day; and observed it was misaddressed. Schnell, Jr., advised Land Air's response

would accordingly be written 10 days from the date of Schneller's letter, not LeVota's letter as requested. There was however no response from Employer before Local 41's attorney had occasion to write a second letter.

LeVota's second letter, dated 16 August 1985, addressed to Amato stated prior Employer correspondent indicated the Union would receive a reply by 1 August 1985; but that it had not received a reply as of 16 August. The LeVota letter recited, *inter alia:*

> In addition to our lack of information as to our members' status, Land Air . . . refuses to clarify its position with reference to the reinstatement of our members. Te refresh your memory, our members unconditionally offered to return to work on or about April 9, 1985. Our members' unconditional offer to return to work has continued unabated since April 9, even though Land Air has refused to take meaningful and concrete steps to schedule collective bargaining. Additional requests to clarify the company's position have not been fruitful.

Copies of prior correspondence were supplied; and it was specifically brought to the attention of Amato that the appeal time had run prior to Amato's letter of 10 June 1985. LeVota's letter then went on to further assert:

> The company's position with regard to the unconditional return of our members is further complicated by an indication by the company that our members would only be offered re-employment as independent contractors and not as employees which are part of the bargaining unit. We reached this conclusion because the only communications we have in this matter is a draft of a letter that was mailed to me but addressed to Teamsters Local 41 by Joseph Schneller, Sr. dated April 9, 1985, a copy of which is attached hereto. This

draft does not appear to have memorialized into a final correspondence but shows an intent on the part of the company to discriminate against our members for their strike activities. Since the National Labor Relations Board has viewed our strike as an economic strike, the company has a duty to reinstate the employees once they have conditionally (sic) agreed to return to work. *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378, 66 LRRM 2737 (1967) and our striking members retain their employee status pursuant to 2(3) of the National Labor Relations Act while on strike. *Neither Teamsters Local 41 nor the striking employees have been advised by the company that they have been permanently replaced.* . . . (Emphasis supplied.)

This questioned document referred to above has not been placed in evidence by any party. With reference to prior Regional Director dimissal letter of 21 May 1985, copy (then) supplied to Amato, LeVota further related:

> . . . the Regional Director had indicated at that time that it did not appear that Land Air had hired any employees since our unconditional offer to return to work on April 9, 1985. Information however has come to Local 41 since Mr. Hendrix's letter of May 21, 1985 in which the company has added additional independent contractors or in the alternative the independent contractors have added additional employees and/or sub-contractors. *All of this however establishes a pattern of conduct on the part of the company that is calculated to unlawfully and unilaterally do away with the certified bargaining unit by unilaterally sub-contracting bargaining unit work without first bargaining with Teamsters Local 41.* Our specific information is that there has been a significant increase in work since April 9, 1985, especially in the Johnson

County, Kansas area. We have been advised that the following individuals at the designated addresses are now performing work previously performed by our bargaining unit and these individuals were not associated with the company prior to April 9, 1985, to-wit: (Emphasis supplied.)

Name	Address
1. Roger Williams	P.O. Box 529, Platte City, MO 64079
2. Jack Wright	1205 Main, Oswatomie, KS 66064
3. Dave Anderson	401 North Washington, Spring Hill, KS 66803
4. Don Fowler	1254 Lowell, Kansas City, KS
5. Tom Pope	5502 N.W. Waukomis, Kansas City, MO
6. Joe Peterson	21270 S. Clair, Spring Hill, KS 66083
7. Keith (last name unknown)	
8. C. Smith	
9. Terry McDonald	

We have also been advised by Emery Air Freight that Land Air Delivery, Inc. will also take on the additional responsibility of all dock work for Emery Air Freight, Inc. and given this increase work force, we see no practical reason precluding our members from being reinstated to their positions with the company. We are also advised that Terry McDonald, listed above, who was previously a dock worker for Emery has left the employment of Emery Air Freight and is now acting as an independent contractor for the Company.

LeVota specifically requested a written position, pertinently as to:

a. The employment statuts of our members per our letter of July 16, 1985;

* * *

c. Our request for service letters pursuant to 290.140 R.S.Mo. 1982;

d. Whether the draft letter of April 9, 1985 correctly states the company's position that our members will only be offered reinstatement as independent contractors;

e. *Whether additional independent contractors or additional employees of independent contractors are performing the work previously done by our bargaining unit;* (emphasis supplied)

f. Why Land Air Delivery, Inc. continues to refuse to reinstate the striking employees and the specific circumstances under times, dates and places under which our members' jobs will be reinstated; and

g. What specific time, place and date the company proposes to meet to resume collective bargaining.

Finally, LeVota's letter advised of the prospect of new charges:

> Because of this new information that shows the significant hiring of independent contracts to perform our bargaining unit's work and because of the now 4-month delay since our members have continually offered to return to work, we consider your company's present refusal to reinstate our members as a violation of 8(A)(3) of the NLRA by discriminating against our members for their union activity associated with their economic strike. Since there was an indication of a potential willingness to resume bargaining we felt in good faith that we should allow your and your company the opportunity to clarify your position before returning to the National Labor Relations Board for appropriate action; however, unless you clarify your position within ten (10) days from the date of this letter, we shall return to the National Labor Relations Board

with our new information to file unfair labor charges for the reasons previously discussed.

While the Union clearly in this letter of 16 August 1985 had raised a concern about Employer's subcontracting and made request for information thereon in general form, the concerns expressed were about information indicating, in contrast with Regional Director earlier determination that Employer had not hired employees after 9 April, that there were now specific indications Employer had thereafter added contractors, or its contractors had added employees, with the specifics of the latter presented by Union for Employer clarification. Significantly, Union pointed out that neither it, or employees had been theretofore advised by Employer that the strikers had been permanently replaced.

By letter of 22 August attorney Amato replied to attorney LeVota, as follows:

> With regard to the employment status of the members I can only state to you the facts as they occurred but as far as putting a label on their status your guess is as good as mine. The facts are that on November 13, 1984 the members went out on strike in an attempt to impose economic sanctions against the company for its refusal to process further a deadlocked grievance. This was in accordance with an addendum to the Agreement between the company and Local 41. The strikers were notified to return to work and failed to do so. *The company hired some additional employees as replacements and continued to conduct business as it formerly did prior to the strike.* On April 9, 1985 the members offered to return to work "unconditionally" and were advised that there were no positions available. Subsequently, a charge was filed with the N.L.R.B, CA-12564 and after an investigation the Regional Director, on May 21, 1985 declined to issue a complaint. No

appeal was taken from this decision. On or about June 22, 1985 members of Local 41 again began picketing the Emery facility on Prarie View Road with a sign that reads, 'On Strike—Teamsters Local 41—Land Air Delivery—Unfair Labor Practice'. This picketing has continued up to and including this date. (Emphasis supplied.)

Not only did Employer not inform the Union that all striking union employees had been replaced by permanent subcontract, Employer specifically disavowed the employees were terminated. Thus after responding to certain union claims made in regard to vacation and sick leave benefits, not deemed further material herein, Amato additionally responded:

In regard to item c. of your letter I am unable to see that the Missouri statute you refer to is pertinent or relevant to this situation. The company did not dismiss any of the members and to the contrary requested that they return to work. In view of the facts as I have stated them above your position of requesting a letter of dismissal pursuant to the Missouri statute cited appears totally inconsistent.

As to the draft of a letter referred to in your item d., I would first of all like to know how that document came into your possession. As you may or may not know, since it was prior to your representation of Local 41, there have been numerous company records, letters, etc. that have mysteriously appeared in the possession of officials of Local 41. In fact the theft of these documents is presently part of a legal action pending in the U.S. District Court in Kansas City which is the reason for my inquiry as to how this letter came into your possession. Nevertheless, it is not now,

nor has is ever been the position or intention of the company to offer reinstatement to the members on the condition that they become independent contractors. The draft letter, as you know, was never signed nor sent and does not even purport to say that such would be a condition of reinstatement. I sincerely question your good faith efforts to resolve these important issues for the members in view of the totally erroneous characterization of the language in the referred to draft letter.

Item 3.; Land Air has continued to conduct its business in the same manner and method as it did following the strike on November 13, 1984. No new contractors or employees have been added since April 9, 1985.

Item f.; Land Air has not refused to reinstate any of the members and does not know at this time when additional employees will be required.

With respect to the names and addresses of the persons you list on page two of your letter, two of the individuals, Don Fowler and Tom Pope, are Land Air Independent Contractors and the rest are employees of Land Air Independent Contractors. All of these persons, with the exception of Terry McDonald, became associated with Land Air or one of its contractors *prior* to April 9, 1985. I am advised that Mr. McDonald was hired by one of the contractors to replace a driver that quit who had been working prior to April 9th.

Employer did not definitively advise the Union that Fowler and Pope had entered subcontracts on 20 February along with the others (Benefield and Ken Horton, and supervisor Mawby on 1 March 1985), let alone that all unit work had been permanently subcontracted out since that

time. In contrast, in regard to those specifically inquired about and addressed by Amato and/or whose circumstances have been earlier addressed (*viz.* Roger Williams, Fowler, Pope and *Terry* McDonald), G.C. Ex. 6 series reflects Anderson and Wright as Rinehart associated drivers since (at least) early December, 1984; Peterson at least since 20 February 1984; Keith similarly (at least) as of 29 March 1985; and C. Smith similarly (at least) as of 8 April 1985.

In final correspondence (of record), by letter dated 3 September 1985 Conder responded to Amato's 1 July letter, confirming desire to meet in Kansas City, providing the Union's proposal, and requesting Amato call Conder. The Union proposal submitted was a one sheet document proposing the new NMFA recently negotiated for period 1 April through 31 March 1988, but with copies of changes enclosed. Conder's letter, though indicating the Union preferred the NMFA also related:

> . . . we recognize tht (sic) if you desire to Negotiate an Agreement other than one involving a Multi-Employer Unit we must and will accommodate that desire. This proposal is in no way intended to require you to join or becone (sic) a part of any Multi-Employer Unit or Group.
>
> The Union reserves the right to add to, delete, or otherwise modify thid (sic) proposal at any time during negotiations.

a. *Emery dock work takeover*

It may be observed that the Amato 22 August letter did not specifically address union assertions as to the claimed significant increased work generally and/or specifically in the Johnson County, Kansas area; nor did it directly address Land Air's taking on the dockwork for Emery. As to the latter, president Schneller has testified

that in July, 1985, Land Air started to do all of Emery's dockwork. However, Schneller explained that prior to this Emery picked up their freight at the airplane, and sorted the freight at the dock. Although Schneller initially said he didn't really know, Schneller thereafter stated that Emery basically had a crew of part-timers in the morning, and a crew in the evening; and Schneller guessed there were about 8-10 employees. Schneller further explained however that when Emery came to Land Air to take over, Emery had streamlined the business, and had done away with most of the freight handling on the dock. Whatever was left, Emery wanted Land Air to do. Moreover, Schneller testified that there was *no* additional compensation granted Land Air for its performance of this new work; and Land Air had to absorb it. According to Schneller, Land Air thus could not afford to hire any new dockwork employees. Land Air in turn forced this work upon the contractors. President Schneller also testified that this work had never been done by bargaining unit people; it had never been done by anyone (with Land Air) before. (There is no specific complaint allegation as to Respondent Employer's failure to reinstate strikers for the above dock work. However, there is general allegation that Respondent Employer has refused, and continued to refuse to reinstate strikers.) The Company urges that it (lack of Emery compensation for the work) was further evidence why the Company could not recall any employees to perform this work.

b. *Increased contractor work*

With regard to contractors being given increased work, Schneller testified only generally. Land Air is provided manifests from Emery computers. Supervisor dispatcher Mawby hands the manifests out to the contractors. They break the freight out; and each contractor takes what goes

to him. President Schneller initially testified that Mawby doesn't decide how much work he is going to give contractors, that the work is broken into geographical areas. Some Land Air contractors don't have any employees, some one, and some more than one. President Schneller testified that there is no set pattern to the work. President Schneller also testified that it was primarily, Michalski who had made the decision on the hire of additional contractors, and/or the arrangements that were made with the contractors on geographical areas, or what work they were to be assigned. However, Schneller later acknowledged that Mawby does it now; and that Mawby makes any adjustments in the work of contractors as required at any given time. Mawby has radio contact with the contractors and their drivers, though contractors/drivers usually call Mawby. Schneller did not know if the contractors had hired additional employees after 9 April 1985. Mawby did not testify.

General Counsel introduced a 21-page exhibit (G.C. Ex. 6) as a document prepared by Land Air personnel and reflecting the number of pickups and deliveries on the date(s) indicated on the document(s) made by Land Air personnel on behalf of Emery. Respondent Employer expressed no objection; indeed expressed willingness to stipulate the documents (making up the exhibit) were prepared in the ordinary course of business; and while reserving only exact accuracy, agreed that for all practical purposes they accurately reflect what happened. The documents cover 21 dates, inclusive of the date before and day of strike (though driver identity on these days was coded for asserted security purposes), the first day following apparent making of the above independent contractor contracts, the day before and day of Union's unconditional offer, and various other dates extending over a year. General Counsel's purpose in offering the exhibit as stated at the proffered time

was to give an idea, over time, as to how much business Land Air did for Emery, because that is the bulk of the work that was performed by the unit. To the extent Respondent would object to any appropriate probative force being given to this Exhibit in assertion made in brief that Employer is not sure what the exhibit proves, that assertion, if intended as an objection to be placed now, e.g. on exhibit inadequacy for purpose offered, in my view comes too late. I shall view the exhibit as appropriately reflecting material dates; and overall, as an adequate random sampling of the business records of Respondent, and certainly for the explicitly stated purpose when offered, without objection. Respondent Employer otherwise, in brief, would itself have the gross revenues observed, with assertion that though fluctuating, the revenues remained in $4000 to $5000 range. This will be done.[4] Pickups and deliveries are thus shown under heading "P/D", and revenues in combined (and rounded) dollars under caption "Rev.". The same may then be portrayed as follows:

[4]Any totals on the exhibit placed in evidence are not legible, nor has Employer supplied its contended summations. Nonetheless the individuals' revenues are presented, and they have been totalled for the purpose.

	Monday P/D /Rev.	Tuesday P/D /Rev.	Wednesday P/D /Rev.	Thursday P/D /Rev.	Friday P/D /Rev.
11-12-84	265/343/$3728	—	—	—	—
1-13-84	—	328/347/$3910	—	—	—
11-26-84	293/198/$2655	—	—	—	—
12-3-84	288/336/$3715	—	—	—	—
12-7-74	—	—	—	—	355/437/$5306
1-3-84 (sic)	—	—	—	312/334/$4292	—
2-21-85	—	—	—	331/405/$4069	—
2-27-85	—	—	348/475/$4926	—	—
3-20-85	—	—	275/477/$4167	—	—
3-29-85	—	—	—	—	344/457/$4643
4-8-85	296/272/$3287	—	—	—	—
4-9-85	—	377/382/$4261	—	—	—
4-17-85	—	—	328/470/$4545	—	—
5-29-85	—	—	406/482/$4786	—	—
6-28-95	—	—	—	—	412/468/$4722
7-15-85	424/405/$4213	—	—	—	—
8-5-85	465/491/$4930	—	—	—	—
8-27-85	—	454/401/$4581	—	—	—
9-9-85	498/520/$5208	—	—	—	—
10-8-85	—	489/549/$5295	—	—	—
11-6-85	—	—	463/521/$5062	—	—

It is readily apparent from the above that Employer has had more pickups and deliveries in the last 10 days (starting 9 April 1985 and extending over a 7-month period) than it did in the prior 11 days (starting the day before the strike and extending through 5-month strike period). There were 3,435 pickups and 4,081 deliveries in the first 11 days, or an average of 311 pickups to 371 deliveries, per day. In the last 10 days there were 4,306 pickups and 4,689 deliveries, or an average of 430 pickups to 469 deliveries, per day. In short, in the 10 days starting 9 April 1985 the average of total pickups per day had increased 38% (119 increase divided by 311 base), and the average of total deliveries had increased 26% (9% increase divided by 371 base). Moreover, contrary to Employer urging, it is as obvious that gross revenues on the average had similarly increased. The gross volumes for the first 11 days presented was in total $44,698, or an average of $4063 gross revenue per day. The gross revenues for the last 10 days presented was $47,603, or an average of $4760 per day. The difference was an increase in average gross revenues per day of $697, or 17% ($697 increase divided by $4063 base). Moreover the increase toward 5000 level is discernibly more pronounced at the end of the second period. New names compatibly begin appearing on G.C. Ex. 6 for the first time in the same period see e.g. Bob (and/or Rob), John, Fred and Gary Sloan; Terry/Mawby and Gary Mawby; and individuals Carl, Steve, Eddie, Donna, and Gribble on Rinehart. I credit Speak (at least) that he began seeing new faces following union and employee strike return on 22 June.

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10. Further contentions and offered evidence on failure to reinstate

Speak testified that Land Air has not to date reinstated any striking employee. Speak testified that Employer has

not notified him they had replaced any unit employee. Land Air is still engaged in the pickup and delivery work for Emery. Speak also testified that from observance of the dock there is no way to tell if drivers are employees of Land Air or subcontractors. All bargaining unit employees wore Emery uniforms. After the strike, although not necessarily immediately, according to Speak, all the individuals who performed the work previously performed by bargaining unit employees, eventually did wear Emery uniforms.

On cross-examination, Speak acknowledged that in 1982 when Speak first began policing the agreement, and prior to negotiation of the 1982-1985 agreement there were then about 12 employees in the bargaining unit; and Speak's recollection was that there were about 25 people working on some kind of contact at that time. He was aware of the prior unit clarification, though before his time, and of the fact that Employer was subcontracting even at that time. Speak did not know the current (last two months) number, but acknowledged it was probably true there are now approximately 25; but he testified that he had personal belief, that there's more contractors and contractor helpers now than when he first came with the unit.

Respondent establishes that in prior affidavit of 1 May 1985, Speak had then stated, "Since that time by 1982 we had about 12 employees on the seniority list and approximately 25 independent contractors." Speak acknowledged that therein he had also stated "I have no idea how many people are currently working for Land Air, probably 25." At hearing, he testified that he didn't know if all of them were contractors or not. He further testified in explanation of the references to 25 contractors of some kind, that to the best of his ability and knowledge they (Land Air) had hired several people just as employees.

On other occasion Speak referred to the 25 as extra people working there that he referred to as contractors, other than bargaining unit employees. On later occasion he also said he would say it was approximately the same number in April 1985 but didn't have any way of keeping up with exact numbers. He didn't have access to the books. Respondent urges, and relies heavily on asserted Speak admission that the number of contractors now are the same as they were before the strike.

Contentions of the parties

General Counsel observes correctly that Respondent has admitted that Employer had subcontracted all the unit work since at least March 1985; that all strikers were permanently replaced; and that Employer acknowledged that Employer had not given earlier notice to, or bargained with the Union concerning its decision to subcontract part, and then the entirety of the unit work. General Counsel asserts that Respondent sees its past practice in subcontracting as privileging its unilateral (subcontracting) actions during the strike. However, General Counsel sees the subcontracting issues as essentially threefold: (1) does an employer have the right to *permanently* subcontract unit work during a strike without notice to, or bargaining with the Union; (2) is the decision to subcontract work in this case a mandatory subject of bargaining under the Board's decision in *Otis Elevator*, 269 NLRB 891 (1984); and did the Union waive its right to bargain about unilateral subcontracting of unit work. On the latter point, on this record, it could not be clearer in background that the Union did not waive its right to bargain about subcontracting of unit work. Indeed Employer does not contend it did; but (seemingly) only that the parties have had dispute over application to prior subcontracting.

General Counsel's basic argument essentially proceeds as follows: Subcontracting as an issue of bargaining normally arises where, as here, it, ". . . will effect some change in the terms and conditions of employment of the employees involved." *Westinghouse Electric Corp.*, 153 NLRB 443, 446 (1965). An employer's subcontracting that effectively eliminates the work of an entire unit of employees, but substitutes a performance of the same work for the employer by a contractor, even when motivated by economic considerations alone, is a mandatory subject of bargaining, *Fibreboard Paper Products, Corp.*, 379 U.S. 203, 214-215 (1964). In strike circumstances, the Board has previously held that permanent replacement by subcontracting is similarly a mandatory subject of bargaining where the effect of a permanent replacement of strikers by subcontract is essentially an abolition of all unit positions, *Alexander Linn Hospital Association*, 244 NLRB 387, 390 (1979), enf'd. 106 LRRM 2546 (3rd Cir. 1980). Indeed the General Counsel has contended that the Board has long required an employer to bargain about subcontracting when the subcontract is intended to be *permanent*, and thus will impair the status of the Union, *Southern California Stationers*, 162 NLRB 1517, 1533-34, 1539-42 (1967). Permanent subcontracting is to be distinguished from nonpermanent, stopgap or temporary measures designed by an employer to continue serving its customers during the strike, *Empire Terminal Warehouse Co.*, 151 NLRB 1359, 1364-1365 (1965). General Counsel concedes that an employer is not under a duty to bargain over temporary subcontracting necessitated by a strike where such subcontracting does not transcend reasonable measures necessary in order to maintain operations in strike circumstances, with acknowledgment that subcontracting prohibition without bargaining are not hard and fast rules nor to be mechanically applied, *Shell Oil Co.*, 149 NLRB 305, 307 (1964)

(adequate notice of transfer of work, willingness to confer and minimal effect on unit); and *Shell Oil Co.*, 149 NLRB 298, 300 (1964) (temporary subcontracts limited in duration to economic strike; and with Board approval of the exercise of right to maintain *established* practices not precluded by contract with respect to subcontracting during period between contracts).

General Counsel thus readily has viewed as distinguishable varying case circumstances where an employer may subcontract as a *temporary* measure to aid the employer to keep its operations intact during a strike, and where the subcontracting during a strike does not exceed what is necessary for that purpose, e.g., as here, to reasonably ensure deliveries to the employer's customers, *Empire Terminal, supra*, 151 NLRB at 1365; and *Shell Oil Co., supra* 149 NLRB at 300-301 (1964), (but notably in the latter, with an issue of any *expanded* subcontracting practices reserved.) General Counsel furthermore acknowledges the appropriate temporary character exists, even if the subcontract period extends beyond the strike, provided the subcontracts when entered are of reasonable duration, and initially dictated by exigencies of the strike, or because of threat of imminent strike, *Elliot River Tours, Inc.*, 246 NLRB 935 (1979).

Employer correctly observes that it is axiomatic that permanent replacement of striking employees for economic reasons during an economic strike does not constitute a violation of the Act, *N.L.R.B.* v. *MacKay Radio*, 304 U.S. 333 (1938). Employer then centrally defends that the strike which commenced on 13 November 1984 was an economic strike; that Employer's permanent replacement of economic strikers with contractors rather than employees was for equally clear economic reason, namely to enable it to continue to meet its contractual obligations to Emery; and (it asserts) permanent replacement by subcontract is

not a violation of the Act. Employer thus contends the economic strikers here were consequently entitled to reinstatement only when, and if work was available. Employer contends the record shows that work was not available on 9 April 1985, and thereafter. Employer further asserts in the latter regard that the record shows no increase in Employment subcontracting since the end of the strike on 9 April 1985.

The Respondent would basically rely on *Arthur Corp.*, 246 NLRB 1183 (1979) urging it as a case in which the Board has affirmed an administrative law judge holding that an employer who (essentially permanently) subcontracted bargaining unit work during a strike did not violate the Act when the Employer refused to reinstate economic strikers who had unconditionally offered to return to work. It was there found that the offer came after subcontract replacements were told and they understood they were to complete the pending work. It seems to me that the *Arthur* case *supra* is distinguishable on two counts. First, the complaint did not allege a violation of Section 8(a)(5); and accordingly it does not address any employer related bargaining obligation under the Act, even in absence of discriminatory motive. A second distinction even on 8(a)(3) and 8(a)(1) violation is that in *Arthur*, as General Counsel correctly observes, the decision to close the affected operation had clearly preceded any union activity, and it was occasioned for clear economic reason. However, Employer has also urged as of particular relevance in the *Arthur* case that the administrative law judge had cited and relied upon the decision of the Ninth Circuit Court of Appeals in *Hawaii Meat Co. v. N.L.R.B.*, 321 F.2d 397 (9th Cir. 1963), wherein the Court had held that an employer's permanent replacement of striking employees with subcontractors was not a violation of the Act, if done for economic reasons. The *Hawaii Meat* case did involve Section 8(a)(5). The trial examiner

however had found, and the Board affirmed in the underlying case, *Hawaii Meat Co.*, 139 NLRB 966 (1962), that the employer was obligated to bargain with the Union about its decision to subcontract out its delivery work, with reliance on its (then) recent *Town & Country Mfg.* case, 136 NLRB 1022 (1962), enf'd. 316 F.2d 846, 847 (5th Cir. 1963). The Board also in *Hawaii Meats* specifically expressed the view that *N.L.R.B.* v. *Mackay Radio*, 304 U.S. 333 (1938) was not dispositive. The Board acknowledged that *Mackay* held that an employer is justified, in attempting to keep his plant in operation, to hire new employees as replacements for economic strikers. However the Board noted the employer was obligated to continue to bargain with the union after a strike occurred; and it thereafter ruled in *Hawaii Meats, supra*, 139 NLRB at 969, "The elimination of unit jobs (and the consequent erosion of the bargaining representative's status) is, we are satisfied a mandatory subject for bargaining, even though the employer may seek to justify his action in terms of the replacement of economic strikers." Notably the Board therein also held, *id.* page 969 "In this case, individual strikers are not being replaced by other employees, but instead, the positions they held before the strike have been eliminated so that no replacement is being substituted for the striker." The Board also observed thereafter the "very existence of the certified unit was at stake." Employer nonetheless urges as language particularly applicable, the Court's asserted comparison of permanent replacement of striking employees with employees, to permanent replacement of employees with subcontractors, 321 F. 2d at 400, to wit:

> We think it no more proper for the Board to intrude upon the decision of the employer in a strike situation to keep going by subcontracting, than to intrude upon a decision to replace, premanently, individual strikers. This, we think, is consistent with

the philosophy expressed by the Supreme Court in *N.L.R.B.* v. *Insurance Agents' Union, 1960*, 361 U.S. 477, 488-498.

Employer argues the above *Hawaii Meats* (Court) decision was cited by the administrative law judge, in the *Arthur* case which (Employer asserts) was then affirmed by the Board. I do not agree. To the contrary it appears to me that what Employer would rely upon as such was actually but the administrative law judge's recitation of that employer's particular contention or urging; and that the judge made it clear in the following paragraph the dispositive rationale was otherwise, *viz.*, "The applicable legal principles covering this case are set forth in *N.L.R.B.* v. *Townhouse T.V. & Appliances, Inc.*, 531 F. 2d 826, 828-829 (7th Cir. 1976) . . .," a case in which the Seventh Circuit enforced in pertinent part the Board's determination that an employer had subcontracted out its delivery unit work to avoid recognition of the Union.[5] The short answer in the issue presented here, in any event, is that the very argument sought to be raised by Employer herein has previously been raised before other administrative law judges, been duly considered, and rejected as inconsistent with existing Board precedent, and with those repeated rulings thereafter approved by the Board, *Alexander Linn Hospital Association*, 244 NLRB 387, 390, and fn. 2 (1979); *Southern California Stationers*, 162 NLRB 1517, 1542 (1967). Contrary to urging by Employer in its brief, the breakdown in attempted analogy of striker employee replacement by employee, and unit displacement by subcontract has been clearly exposed, and flaw explicated, *American Cyanamid Co.*, 235 NLRB 1316, 1323 (1978), enf'd. 592 F. 2d 356, 358 (1979). I am bound by existing Board precedent, not

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[5] *Townhouse T.V. & Appliances*, 213 NLRB 716, 723A (1974).

clearly reversed by the Supreme Court, or the Board. *Iowa Beef Packers, Inc.*, 144 NLRB 615 (1963).

Employer has itself otherwise raised as salient the Board's ruling in *Elliott River Tours, Inc.*, 246 NLRB 935 (1979), overruling an administrative law judge, and finding an employer did not violate the Act in subcontracting an employer's commercial river trips for 1978 *and* 1979 to other outfitters when the employer was presented with an imminent strike threat from the entire unit of Oregon river guides. The Board specifically held the employer in such circumstances was rightly concerned that its customers not face an abrupt cancellation of their trips after coming long distances; and the subcontractor outfitter there *conditioned* its acceptance of providing the 1978 service on the contractor's inclusion of the 1979 season. The subcontracting of 1978 and 1979 trips could thus be, and was considered an economic and business necessity faced by the Employer. I am persuaded that the *Elliot River Tours* case is, as General Counsel contends it to be, a case of permissible temporary subcontracting, with the expanded length of contract reasonably warranted on the particular circumstances of that case, circumstances that are demonstrably inapposite to those presented here, as discussed further *infra*.

To the extent Employer would rely on other Board holdings, e.g., in *Precision Castings Co.*, 233 NLRB 183 (1977), and *The Emporium*, 221 NLRB 1211 (1975), the reliance is misplaced. It is clear those cases are inapposite on their facts in that in *Precision Castings* there were no discernible adverse effects on the unit occasioned by subcontracting, 233 NLRB at 210; and in the *Emporium* case, a clear prior opportunity had been provided the Union to bargain about the contracting because of Employer's timely notice to Union of *prospective* cessation of unit tailoring work and subcontract of it to independent contractor, a condition

also clearly lacking here. Moreover it is clear, *id.* fn. 1, that the Board relied on *Westinghouse Electric Corp., Bettis Atomic Power Laboratory,* 153 NLRB 443 (1965) where at 446 it reviewed its clarification of holdings on subcontracting noting particularly there is no violation where there is no "significant detriment" to employees in the unit. Clearly such is inapposite here. As it is not the effect of a contractual prohibition of subcontracting during a strike that is of controlling consideration, Employer's reliance on *Pittsburg Die Striker's Lodge No. 50* v. *Pittsburg Forgings Co.,* 255 F. Supp. 142 (W.D. Pa. 1966) that an employer can subcontract in a strike, cannot cause Employer to prevail.

In summary then, the record before me, considered in its entirety, makes it appear sufficiently clear that soon after the strike had commenced on 13 November 1984, Employer had been able to make its required deliveries for Emery by an initial and changing mix of use of its employees from other locations, its contractors and contractor drivers, newly-hired employees and use of its own office staff and/or supervisors, and various relatives and spouses of the above. Respondent's general summary that "it wasn't easy" to hire drivers when the strike began must be viewed in that light, and it does not reasonably extend to buttress February-March contracts. After the first week or so of the strike Employer settled in, meeting its service deliveries essentially with a mix of contractors and contractors' drivers, newly-hired employees, and continued use of its supervisors, e.g., Schneller, Jr., Mawby and Lynch. There is simply no evidence offered by Employer that is persuasive that in late February or early March, 1985, that Employer was acting out of business necessity in entering contracts for the first time with Benefield, Fowler, Horton, Pope and supervisor Mawby.

Respondent's bare assertion, subsequently revealed to be uncorroborated hearsay at that, that these employees "would rather work as contractors" does not suffice to establish these employees had demanded as a condition for their continued service, that they be made contractors. Certainly the same does not excuse or justify Respondent's act at that time entering subcontracts with not just the five, but all of its contractors, and in substance and effect thereby permanently eliminating all unit work for employees, without prior notice to the Union, or Employer bargaining thereon. Whatever may or may not be the merits of the disputes between the parties over use of its contractors prior to the strike, none of its contractors before the strike are shown to have performed the unit work specifically performed by *these* 13 unit employees. The 5 contracts entered for the first time by their terms put into Employer's service 7 pieces of equipment; and they alone thus affected half of the units' work, despite the fact that Respondent by this time was experiencing no difficulty in meeting its deliveries otherwise, e.g. by employee and supervisor service as drivers. Although Employer did not join in the informal settlement of its charge, the Employer was certainly aware the Union had entered the settlement agreement in early February, and it was aware of the terms of the agreement under which the Union had agreed, and was to notify its employee-members, that the Union would not in the future engage in unlawful local or ambulatory picketing, or other specifically described unlawful conduct. In agreement with General Counsel contention, I conclude and find, *infra* Part II, that there was no evidence offered of any strike violence, or threat of same, by anyone after 4 February when the Union entered this agreement. The General Counsel contends not just the five (or seven) positions filled by the five new contractors but all unit positions were effectively extinguished by the Employer's treatment of its

February-March contracts as permanent replacement of unit employees. I agree, at least as to 12 of the unit employees. (One position, that servicing General Motors' Leeds facility, would on the face of this record appear potentially permanently lost to Employer's competitor, Shock Transfer.) I further find myself in agreement with General Counsel's contention that by the above acts of permanent subcontracting Employer has violated Section 8(a)(5) and (1), unless the matter is to be deemed not such for some other reason.

Certain generally applicable principles are clear. An employer may not make unilateral changes in mandatory subjects of bargaining prior to a good faith impasse in bargaining, *Milwaukee Spring Division*, 268 NLRB 601 (1984); nor make changes in mandatory terms and conditions of employment contained in an existing contract, without union consent, *Brown Co.*, 278 NLRB No. 113 (1986); Section 8(d) of the Act. Mere good faith and willingness to bargain is no defense for an Employer who in fact makes unilateral changes in working conditions during a period of negotiations, *NLRB* v. *Katz*, 369 U.S. 736, 743 (1962). An employer also has a statutory obligation to continue to follow the established terms and conditions of an expired contract as to the employer-employee relationship pending negotiations and until it has bargained to impasse with their exclusive representative, cf. *Richmond Recording Corp.*, 280 NLRB No. 77, Slip Op. (24 June 1986), ALJ Dec. pg. 32.

Here the contract terminated on 31 March 1985, during an ongoing strike. However, the permanent subcontract of all the unit work had already substantially occurred, in late February, and it was completed in early March, thus during the life of the contract, and accomplished without notice to the Union, let alone with its consent. While the contract had terminated on 31 March 1985,

thus before the Union's unconditional offer to return made on behalf of all employees, the only prior notice the Employer had given the Union on the course of future bargaining, was of its timely withdrawal from the multi-employer association, and its determination not to be bound by any contract that association might negotiate. Employer did not withdraw recognition from the Union. Its obligation was to continue to negotiate with the Union as the representative of its employees, upon demand. The fact the Union continued on strike after termination of the prior agreement did not serve to extinguish Employer's obligation to bargain with the Union about any Employer desired changes albeit on its desired individual Employer basis.

Employer did not give notice to the Union of its action, or intention with regard to a permanent subcontracting of all unit positions, neither in February-March, nor at time of actual termination of the agreement; and not even at time of Union's unconditional offer to return to work made on behalf of all striking employees. I am not persuaded there is any efficacy to that end, in Michalski surprise of an interest by employees in a return to employment (as opposed to when they returned), where the strike of employees had continued unabated at Employer's entrance. I am wholly persuaded that Employer's intended permanency of the prior subcontracts is sufficiently made evident from the continued use of subcontract drivers (certainly beyond the contractual 30-day required notice of termination provision), and the Empolyer's continued failure to recall the available employees. But the Union was not made aware of any of this. It is one thing for an employer to (essentially) indicate to the Union and employees that as a result of their economic strike and the employer's concurrent determination to, and successful conduct of operations, employees have been replaced in their indi-

vidual positions, and resultingly there are presently no open unit positions then available for the formerly striking employees to return to. It is quite another, for the formerly striking employees and their representative to have not been consulted, and to be kept ignorant of the accomplished fact that the very unit positions, previously occupied by the striking employees, and as to which the Union has bargaining status in representing employees, have been unilaterally and permanently contracted away by their employer to others, without any notice to the employees, or opportunity for their exclusive representative to have bargained on their behalf with Employer thereon. Any subsequent offer to bargain generally, so long as the facts of permanent subcontracting remained undisclosed, absolves Employer of nothing. The only remaining substantive issue on Employer's initial failure to bargain with the Union over subcontracting is thus whether Employer's decision made unilaterally to permanent subcontract to independent contractors was a decision made unilaterally on a mandatory subject of bargaining in the circumstances of this case.

On this issue of Employer's decision to permanently subcontract unit work to independent contractors as an issue of a decision on a mandatory subject of bargaining, General Counsel correctly observes we look to the Board's ruling in *Otis Elevator*, 269 NLRB 891 (1984), where, at page 892, the Board stated:

> . . . the critical factor to a determination whether the decision is subject to mandatory bargaining is the essence of the decision itself, i.e., whether it turns upon a change in nature of the business, or turns on labor costs.

The facts supportive and warranting the ready conclusion that Employer's subcontracting did not effect a change in

the nature of the business are fully set forth above in detail and need not be repeated beyond brief summary here that it is obvious that Employer provides the same services to Emery, continues to conduct its business at the same locations and facilities, did so with the same supervisors; and conducts essentially the same pickup and delivery operations. The only thing that has changed is that contractors and their employee drivers now perform all the bargaining unit work previously performed by the unit employees, circumstances essentially much akin to those presented in the *Fibreboard Products* case, *supra*. The above is hardly indicative of a fundamental change in direction of the business. Nor do I conclude it has been made so by Employer's (arguably) concurrent sale of certain van (and truck) equipment, where some has been sold to the same independent contractors, and some retained for continued use of supervisors on bargaining unit work, and for (spare) use by contractors in the same work, or junked for obsolescence that would be present in any case, albeit some has also been sold to truck dealer in unspecified amount. In my view this is not the type of, or adequate showing made of withdrawal of capital, that the Board has previously considered as portryaing a substantive redirection of enterprise. There was also no showing made by Employer of any business need for speed, or confidentiality, or "unencumbered decision making" in such action.

To the extent the Employer has advanced contention that the Company's business has taken on a new direction and undergone a change in nature by virtue of Emery's imposition of certain dockwork on Land Air in the summer of 1985, apart from Employer's urging the same work was much reduced by Emery, the shorter answer is that that later business condition can afford no support or justification for Employer's action in permanently subcontracting

3 or 4 months earlier in the year. (For the same reason I do not rely on General Counsel's labor cost saving arguments based on that same period.) Moreover their appears to be no evidentiary warrant in this record to conclude that had Employer allowed former striking employees to timely return, they would not have been able to assimilate these new dock duties, just as well, at that time.

The General Counsel has not sought to show, or if so, has not successfully shown that independent contractor base (75% of gross) effected direct labor cost savings to Employer over its prior costs generated from payment of unit employee wages and benefits, etc. General Counsel's arguments appear to centrally rest on the prior Board holdings prohibition an Employer's *permanent* subcontract of the unit work in strike circumstances, because of its destruction of unit positions, and union representation status, as noted earlier. Neither has Employer addressed that consideration.

Employer has argued in brief that the use of employee drivers with its own equipment, stored at the Land Air (Emery) facilities had cost the Company considerable sums of money, which were expended to provide security for its equipment, and to repair vehicles because of patterns of vandalism, and violence. Whatever might have been the efficacy of such an argument if applicable to period and circumstances prevalent early on in the strike, see related discussion Part II *infra*, it has much less convincing factual base and support in explaining late February early March subcontracts, particularly where also following union entry of settlement agreement on 4 February 1985, and related union pledge not to engage in certain such acts; and where there are no such acts thereafter reported for at least some two weeks before Employer permanently subcontracts the unit work away. The absence of a convincing justification being advanced, and Employer's con-

cealment from the Union, strongly indicate other reason, an unlawful discriminatory one. Moreover, even if to be construed otherwise, the Board must deal with industrial reality. It seems to me that an employer's labor costs also realistically extends to costs associated with labor unrest, including any inefficiencies in costs of operations resulting from its employees engagement in a lawful strike. To the extent unlawful conduct results in additional financial loss through damage to property, etc. and is traceable to Union, or employees as agents of the Union, such conduct is unlawful and can be remedied in other forum, cf. *Construction Workers* v. *Laburnium Constr. Corp.*, 347 U.S. 656 (1964). If the conduct a union is shown to have been egregious, the Board may impose a forfeiture of bargaining order, *Laura Modes Co.*, 144 NLRB 1592 (1963). It is not however to be remedied by an Employer's own unilateral action of secretively subcontracting away all unit positions, and a related concealed practical destruction of the Union's representative status. The subject of discriminatorily motivated contracting was specifically excluded in *Otis Elevator*, *supra*, 269 NLRB at fn. 4, p. 892; and cf. *Sands Motel and AMM, Inc.*, 280 NLRB No. 13, Slip Op., p. 2, fn. 2 (30 May 1986). Even if not to be so construed, in regard to any final weakness in Employer's asserted basis for unilaterally subcontracting all unit work permanently, Supreme Court observation may appropriately be recalled on bargaining obligation, as stated in *N.L.R.B.* v. *Katz*, *supra*, 369 U.S. at 747:

> Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment. It will often disclose an unwillingness to agree with the Union. It will rarely be justified by any reason of substance.

Employer's arguments based on *Otis Elevator, supra,* and on *First National Maintenance Corp.* v. *N.L.R.B.*, 452 U.S. 666 (1981), resting on a claimed applicability of the principle that ". . . those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from the area . . ". of mandatory bargaining, in my view, are of no avail to Employer on the facts of this case, on either count. It is further concluded that the Employer's secretive determination, in the fourth month of an ongoing strike of its employees, to unilaterally and permanently subcontract all unit work to others, unless shown compelled as a business necessity arising from the exigencies of that strike, *is* both, in essence, discriminatory, and as well amenable to the bargaining process as a prospective change in a mandatory subject of bargaining, and of nature and order of magnitude that the employer must first engage the Union to impasse, absent waiver, before unilateral action by the Employer is to be deemed appropriate.

Employer has also advanced a reliance on *Handy Andy Associates, Inc.*, 277 NLRB No. 29 (1985). The facts of that case are inapposite. Aside from a consideration of the fact that the contract in that case contained a contractual provision that the parties agreed permitted employer subcontracting, employer gave *advance notice* on 22 February 1983 of its intent to subcontract the unit work out as of 23 April 1983, which was after contract expiration date of 1 April 1983. In the interim employer agreed to negotiate for a new contract (at least) until the subcontract issue was resolved in a forum as provided by the prior contract. The Administrative Law Judge there essentially found the Union had *waived* its right to bargain over the employer's decision to subcontract; and that the subcontract itself was occasioned for lawful economic reasons. A union waiver

must be clear and unambiguous, *Brown Co.*, 278 NLRB No. 113 (1986). Whatever may be the outcome of *specific* grievances the Union may seek to enforce on prestrike subcontracting under the instant contract in other forum, the particulars of which are not even presented by Employer herein to support or advance its position that this is not a proper forum to reach (any) subcontracting issue, I conclude the argument made here in general form is without merit. Furthermore, the Board is not a party thereto. See in that regard supporting general rule, *Albritton Communications, Inc., et al.*, 271 NLRB 201, 202, fn. 4 (1984), enf'd. on other ground, 766 F.2d 812, 820 (3rd Cir. 1985). Moreover, given the language of the prior contract, the background of a strike over the deadlocked grievance, and the lack of any effective notice given by Employer of its intent to permanently subcontract *all* unit positions, during the strike, it can hardly be effectively argued herein by Employer that the Union had waived bargaining position on employer's permanent subcontracting of all unit positions, which would appear a wholly different issue presentment, in any event, and one for this forum.

There remains only to address Employer's final 10(b) arguments. Employer's arguments presented essentially run as follows: All actions of the Employer prior to April, 1985, are not properly the subject of (timely) unfair labor practice charges. The contract's provision proscribing Employer subcontracting expired with the (NMFA) contract on 31 March 1985. Thereafter there existed no prohibition against Employer's subcontracting (presumably unit work). Any refusal to bargain question (sic unfair labor practice) must arise after April, 1985. The Union filed an earlier charge over Employer's failure to immediately reinstate the economic strikers, and that charge was dismissed. At no time during the life of the strike, or for two months thereafter did the Union request any information about Em-

ployer's subcontracting; and it cannot be said the Company refused to supply information when it was never requested to provide it. The latter position presupposes no Employer obligation to give prior notice to and bargain with the Union about its own desire to *permanently* subcontract all unit work, a position I have earlier concluded under applicable Board precedent to be without substantive merit.

General Counsel answers Respondent's 10(b) claims are without merit. General Counsel argues that there is no evidence presented that Respondent *ever* told the Union that Employer had permanently subcontracted out all the unit work. Despite a 3 June 1985 specific request by Speak for information concerning subcontracting, the Respondent failed to respond. General Counsel further argues that throughout the Summer and Fall of 1985, Respondent engaged in a charade of setting negotiation meetings, and soliciting bargaining proposals from the Union concerning a bargaining unit that Respondent had already unilaterally eliminated. General Counsel would have observed that Respondent's 22 August 1985 letter (in response) to the Union's attorney had merely stated that after the strike, "the Company hired some additional employees as replacements," and that after the 9 April 1985 offer to return to work, "there were no positions available." The General Counsel thus centrally argues there is no evidence that the Union in fact knew, or should have known that the Respondent had (permanently) subcontracted all the unit work six months prior to the filing of the (presumably amended) charge (of 20 February 1986). Moreover, so argues General Counsel, the amended charge is sufficiently related to the original charge filed October 1985 to bring paragraph 7 of the complaint into compliance with Section 10(b) of the Act. The General Counsel also asserted that Respondent did not reveal that it had permanently subcontracted all the unit work until the investigation of the instant

charge. General Counsel does not point to direct evidence of record to support that specific assertion. The record however does reveal that Regional Director dismissal letter of 21 May 1985 did not address the subject of subcontracting, nor a *permanent* subcontracting of all unit work. Neither General Counsel nor Employer have submitted authority in support of their respectively urged positions on application of 10(b) provisions.

The instant complaint alleges in paragraph 7 that on or about 1 February 1985, Respondent subcontracted pickup and delivery of air freight previously performed by unit employees to independent contractors; and that Respondent did so without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain as the exclusive representative of Respondent's employees with respect to such acts and conduct. On weight of evidence presented before me I have found that Employer did subcontract out all of the unit work to contractors, under contracts that were then cancellable on thirty days notice, and most of which were entered on 20 February 1985, and the last on 1 March 1985. Had Employer concurrently notified the Union, or employees of its intended entry, or actual entry into permanent subcontract of the unit work when it entered the above contracts, commencing 20 February 1985, the 10(b) period would have begun to run immediately, and thus have expired on 19 August 1985, rendering clearly the amended charge and likely the original charge as well, untimely. But the Employer did *not* concurrently notify either the Union, or any of the affected unit employees at that time it had decided to and or had permanently subcontracted away all of their unit positions.

In paragraph 8 of the complaint it is alleged that by engaging in the above conduct, Respondent has violated Section 8(a)(1); and in paragraph 10 that by engaging in

such conduct, Respondent violated Sections 8(a)(5) and (1). There is thus a double allegation of violation of Section 8(a)(1), one in connection with Section 8(a)(5), and one separately.

The complaint also alleges that since 9 April 1985, Employer failed and refused to reinstate the employees following their unconditional offer to return to employment. In paragraph 8 of the Complaint it is alleged that by engaging in such conduct Respondent has violated Section 8(a)(1); and in paragraph 9, that by such acts Respondent has discriminated (against formerly striking employee), and violated Section 8(a)(3) and (1). Again there are two allegations of violation of Section 8(a)(1), one in connection with Section 8(a)(3), and one separately.

The initial or original charge underlying the instant complaint was filed on 8 October, served on Employer on 8 October 1985. This original charge alleged Employer had violated Sections 8(a)(3) and (1), in that:

> Since on or about April 9, 1985, Land Air Delivery has hired one employee, Terry McDonald, and has caused to be hired, by other Land Air contractors, other employees of sub-Independent contractors to perform the same work as was performed by the bargaining unit. *In the alternative, Land Air Delivery has, since April 9, 1985, continued to allow independent contractors or sub-Independent contractors to continue to perform work of the bargaining unit once there was an unconditional offer to return to work.* It is my information and belief the following individuals at the designated addresses are now performing work previously performed by out bargaining unit, . . ." (Emphasis supplied).

This charge went on to specify the same names and addresses of individuals such as were then (arguably) known

by the Union in the sense of having been of some informational notice, and subject of inquiry by union attorney LeVota in his letter of 16 August 1985, a letter sent directly to Employer's attorney. This original charge does not allege a violation of Section 8(a)(5). It otherwise alleges generally that, "By the above and other acts, the above named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act." The 10(b) period for this charge would appear to clearly encompass 9 April 1985.

On 20 February 1986, the Union filed an amended charge (served on 20 February 1986), alleging violations of 8(a)(1), (3) and (5), and specifying:

> On or about February 1, 1985, it by its officers, agents and representatives subcontracted out bargaining unit work without notice to or bargaining with the Union.
>
> On or about April 9, 1985, it by its officers, agents and representatives failed and refused to reinstate striking employees who had made an unconditional offer to return to work.

In light of the notice facts of the case, it makes no difference which date is controlling. Employer does not establish notice given the Union even on a 10(b) commencing date on latter basis, *viz.*, of 21 August 1985.

Analysis

At the outset it may be observed that a dismissal of a prior charge does not constitute an adjudication on the merits, and the doctrine of *res judicata* has no application; but a subsequent charge must itself be one timely filed, *Pepsi-Cola Bottlers of Atlanta*, 267 NLRB 1100, fn. 2 (1983). Otherwise we may begin with observation that Section 10(b) of the Act provides in pertinent part:

> Provided . . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made. . . .

The above filing and service requirements appear in the conjunctive.

The Board has held that the act's 10(b) limitation period commences to run when an employee receives *unequivocal* notice from an employer of the employer's *final and unconditional decision* for the employee's removal from employ, *Postal Service Marina Center*, 271 NLRB 397 (1984); and *Photographers Guild, Local 659, IATSE (Paramount Picture Corp.)*, 276 NLRB No. 91, Slip Op., p. 4 (30 September 1985). In reaching its determinations in the *Marina Mail* case *supra* the Board relied on Supreme Court similar approach in *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980) (tenure), and *Chardon* v. *Fernandez*, 454 U.S. 6 (1981) (termination) cases. The reverse is also true. It cannot be said that Union or employees were in position to file unfair labor practice charges on acts or conduct of Employer of which neither the Union, nor employees had clear or unequivocal notice. Said another way, also well established, the charging party must have actual or constructive notice of the alleged unfair labor practice; the notice must be of clear, and of unequivocal nature; and the burden of showing such notice is on the party raising the affirmative defense of Section 10(b), cf. *Service Employees, Local 3036 (Linden Maintenance)*, 280 NLRB No. 115, Slip Op. pp. 3-4 (24 June 1986), and see case cited in fns. 2 and 3. The otherwise valid distinctions of *Local Lodge No. 1424, IAM* v. *NLRB (Bryan Mfg. Co.)*, 362 U.S. 411, 417 (1960) have no application to a fraudulent concealment of an event urged to toll the statute. *Id.* 429, fn. 19. See also (albeit in context of a reinstated charge) a required "nexus"

of an event's concealment to operative facts, there found failing, *Duff Norton Co.*, 275 NLRB No. 93 (31 May 1985). General Counsel's alternative argument on the amended charge's allegation of 8(a)(5) (and 8(a)(3) and (1)) relating back to the original 8(a)(3) and (1) charge allegations, would appear to turn on considerations of whether there is a virtually inseparable relationship between that which is alleged in the amended charge with that of the original charge, or whether the amended charge has alleged separate and distinct violations that arise from two entirely independent events, one of which, arising in the amended charge, is time-barred. *Carpenters, Millright Local 720 (Stone & Webster Engineering)*, 274 NLRB No. 219 (29 March 1985). As noted *infra*, I need not reach General Counsel's alternative argument, as in the end, I conclude and find on the basis of an application of the above 10(b) principles, and in agreement with General Counsel's basic contentions, that Employer's 10(b) arguments are neither adequately supported in fact, nor persuasive, and otherwise considered, lack merit.

Whatever the observation and/or urging is to be advanced that the Union, and employees were aware from 9 April that employees were not immediately reinstated on the occasion of their initial (oral) offer to unconditionally return to employment, neither the employees, nor the Union were reasonably put on notice that they were to be denied any opportunity for reinstatement, let alone specifically that they would not be reinstated because all their unit positions had been unilaterally and permanently subcontracted to others. All that Speak and the employees were told on 9 April 1985, was that their return had not been anticipated, and that there was no work for them that day. Indeed Employer's act in securing up-to-date phone numbers and addresses on 9 April would only tend to support

a reasonable anticipation on the part of employees and the Union of a return at some time in the future.

Whether it was the very next day (10 April) that Speak sent the employees out again to return to work, or the next and same day (11 April) that Speak filed the (dismissed) charge, or the day thereafter (12 April), would appear to be immaterial. Once again the employees who reported for work were told there was no work for them that day. The attendant circumstance that the employees on this occasion were also told to stay off the Employer's property, is not a reasonable equivalent, in my view, of a clear or constructive notice that Employer did not intend to reinstate any of them at all in the future, nor of the reason, *viz.*, Employer's earlier permanent subcontract of their unit positions away to others. At that time there were any number of other inferences possible, e.g., that their positions had been filled by employees hired as replacements; that the contracts of (temporary) contractors by their terms precluded their immediate return for a reasonable period (e.g. as arguably here, for 30 days), and that there was no work for them that day and they would be called when there was; and/or because of certain circumstances of the prior picketing conduct by employees, certain of their number were no longer welcome on Employer's premises. But the dispositive fact here is that Employer elected to tell the employees nothing more definitively than that there was no work that day.

The fact that the Union filed charge(s) on 11 April, and that charge was subsequently dismissed does not establish the Union had actual, or constructive knowledge of Employer's earlier permanent subcontracting. The dismissed charge (in evidence) does not lend support to Employer's position. It was incumbent on Employer to establish the fact, and the connection, if otherwise. The dismissal letter affords no such support, and if anything,

in addressing Employer's post 9 April conduct, indicates the contrary. The fact of a Speak's subsequent inquiry on 3 June, for the first time (on this record), raising inquiry on the status of Employer's subcontracting on unit work, but confirms it. The 10 June 1985 nonresponsive answer of Respondent to Speak inquiry was not only erroneous in stated base, it was not subsequently clarified. Had Speak's inquiry even then been answered candidly, Speak and the Union would have been put on notice and with time to act in several directions within statutory imperative period.

There is thus evidentiary warrant on this record to conclude by Respondent nonresponsiveness, and/or its continued nonresponse to Speak's inquiry, notice of Employer's February-March subcontracting that had affected all bargaining unit work, was in fact being consciously withheld by the Employer from the Union. In short, the evidence warrants the conclusion that Employer, in substance and effect, was engaged in an active concealment of the operative facts. Moreover, union attorney LeVota on 16 July 1985, in a letter addressed to Schneller, Jr., at Amato request, but with copy to Amato, *inter alia*, requested related specific information on the employment status of the employees under Missouri law. Though Schneller, Jr., in letter of 22 July assured LeVota the inquiry would be handled within 10 days, it was not. Had the Union's attorney then been notified of the permanent subcontracting accomplished by Employer commencing on 20 February 1985, the Union would have had time to file a charge within 6 months of the permanent subcontracting event if it had determined it to be then advisable, as it likely would have.

Ironically the only arguable notice the Company ever gave the Union as to its prior subcontracting in this entire presentment arises out of Union attorney LeVota's second letter, effectively forcing same, and wherein the Union both advised Employer of its own understanding that

neither Union, nor employees, had ever been informed that the employees had been permanently replaced, and in which Union also advised Employer of all of Union's own collected informations and beliefs on observed new individuals working on unit work, and specifically asking Employer for confirmation on their, and unit employees actual status. However, and first with regard to the repeated union request for an Employer report on the employment status of unit employees who had previously struck, but since 9 April 1985 had offered to return unconditionally, Employer only declined to "label" them. Then purporting to otherwise state the facts, Emloyer related only that, "The Company hired some additional employees as replacements and continued to conduct business as it formerly did prior to the strike." With regard to members" (employees') unconditional offer of 9 April, Employer again responded only that it had advised the employees (and the Union) that there were no positions available. Employer still did not definitively advise the Union that all the unit work and/or positions had been earlier *permanently* contracted out.

However, Employer did do more than General Counsel has highlighted. Thus, Employer did advise the Union that two of the individuals who were subject of union inquiry, were in fact Land Air independent contractors (Fowler and Pope), the rest employees of contractors; all of them but Terry McDonald associated with contractors prior to 9 April; and McDonald hired by a contractor after 9 April, but to replace a driver previously employed by the contractor before 9 April, 1985, but who had quit. Significantly, however, the Employer also specifically denied it had dismissed any (striking) employees, adding only it did not know when it would have work for them. It is no moment for wonderment by me, that under these circumstances, the Union on receipt of Employer's assurance that unit employees had not been terminated, had reasonably further con-

cluded that Employer was, *inter alia*, improperly and unlawfully continuing the employment and/or use of (temporary) subcontractors, while refusing to reinstate the formerly striking unit employees after their unconditional offer to return. This is precisely the subject of the Union's original charge, under these circumstances, timely filed on 8 October 1985.

Even if I were to construe Employer's 22 August information as to contractors employed prior to 9 April continuing in employment as serving as unequivocal notice to the Union that Employer had entered permanent subcontracts, and also had permanently subcontracted all unit positions (which, on evidence of record I do not), that information was not imparted by Employer to Union before letter dated 22 August 1986. While the record does not definitively reflect when Union received the 22 August 1985 letter, it is no less clear even that (at best) arguably constructive notice was written within 10(b) period to 20 February 1986 amended charge, filing and service.

There is in fact no evidence that I have been able to discern in this record, wherein Employer before this charge was filed had informed the Union simply, clearly, candidly or unequivocally that it had in fact permanently subcontracted all unit positions to others. The required adequate notice to start the tolling of the statute is not a matter of "hare and hound" decipher play, but of required unequivocal notice. To allow for less is to necessarily weaken collective bargaining. Moreover, prior to its 8 October charge filing, the Union surely would never have surmised an elimination of the unit positions from Employer interim conduct in proceeding with a probe of the Union for mutual agreeable dates for negotiation, or from Employer's solicitation of a Union proposal for a naw contract. If some of the evidence above would tend to indicate the Employer was traveling on belief that its use of all independent contractors

were as employee replacements, the short answer is that Employer has not so defended the matter, and in any event, under established Board precedent would have been proceeding in error. Moreover, the same would but expose, on the facts of record, that the switch to claim of prior permanent subcontract was afterthought, and certainly never timely noticed to Union to begin toll of the statute. The circumstance that the subcontract of unit positions was to several contractors, rather than one, does not alter the substantive effect of the complete elimination of all unit positions.

It is apparent to me from all of the foregoing considerations, and I now accordingly conclude and find that the Employer never gave the Union, or the striking unit employees the required clear and unequivocal notice of Employer's intent to or Employer's actual permanent subcontract of unit positions. Neither, do I find, that the Union had actual, or constructive notice of same from its observations and gathering of information and beliefs, in light of its inquiries and Employer response thereto, and Employer's conduct otherwise. Accordingly I conclude Employer's 10(b) arguments to be without merit.

Having found that there never was the required prior notice from Employer to the Union that Employer had permanently subcontracted unit positions, and concluded that both charge and amended charge were timely filed and served, the case need not rest on General Counsel's alternative argument that the amended ((8(a)(5)) charge allegations are "virtually inseparable" from that timely alleged in the original (8(a)(3) and (1)) charge filed on 8 October 1985; and accordingly I need not reach that issue.

It is concluded and found that in period commencing 20 February 1985 and ending 1 March 1985, Employer's permanently subcontracted unit positions to others, without prior notice to the Union and without affording the exclu-

sive representative of unit employees an opportunity to negotiate and bargain thereon, thus acted unilaterally, and in violation of Section 8(a)(5) and (1) of the Act. It is further concluded and found that by refusing to reinstate the formerly striking employees, upon their unconditional offer to return to work, thus from on and after 9 April 1985, Employer has declined to do so for improper reason and thus in substance and effect has discriminated against unit employee for having engaged in a prior strike, in violation of Section 8(a)(3) and (1) of the Act.

Part Two

The Alleged Employee Misconduct

1. The Contentions, and authorities presented

The Respondent contends there is ample evidence of vandalism, violence, threats and general picket line misconduct, some of which is directly attributable to specific employees.[7] Employer argues that other evidence not attributable to any specific employee, nevertheless shows a pattern and scheme of violence and misconduct on the part of the Union. At hearing Employer reserved argument all employees engaged in misconduct. Employer in its brief appears to have continued general assertion reinstatement is inappropriate and impossible; and specifically contends the activity of striking employees *Joe Fincher*, *Lindsay Cundiff*, *William Greenfield*, and *Walter Gunn* was violent, criminal in nature and impinged on the rights of others. According to Employer it consisted of intentional damage to property, threats and attempted intimidation of others, activities which placed others in immediate personal danger, and the aiding and abetting of others in such activities. If so to be determined, Employer correctly urges under the applicable Board standards of *Clear Pine Mouldings*, 268 NLRB 1044 (1984) such conduct clearly disqualifies those

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(4) individuals from any eligibility for reinstatement. Employer in brief claimed preservation of right to argue, and thus I have construed to have further argued that Employer had no obligation to continue to bargain with the Union because, by virtue of Union's unlawful conduct, Union stripped itself of representative status.

General Counsel observes that Respondent at no time discharged any employee for misconduct; and that it (as of hearing) has not indicated specifically which employees it is contending it failed to recall on 9 April because of strike misconduct. General Counsel acknowledges *Clear Pine Mouldings, supra* is the applicable standard, but argues refinedly that all strikers are not to be condemned by the misconduct of a few; nor do striking employees forfeit their right to reinstatement by failing to disassociate themselves from the misconduct of others unless they have authorized or ratified the conduct of the participants, *Roadway Express, Inc.*, 250 NLRB 393 (1980), enft. den. on other grounds, 647 F.2d 415 (4th Cir. 1981). General Counsel additionally points out correctly that the resumption of picketing in response to Respondent's refusal to reinstate the strikers does not nullify their unconditional offer to return to work, *Woodlawn Hospital*, 233 NLRB 782, 793 (1977), enft. den. in part on other grounds, enf'd. in part and remanded, 596 F.2d 1330, 1333 (1979). General Counsel otherwise notes that the burden is on Respondent to establish that at the time it refused reinstatement to unit employees on 9 April 1985, that it had a good faith belief the strikers who were denied reinstatement had engaged in misconduct of such a serious character as to justify Respondent in denying them their jobs, citing *Burnup & Sims, Inc.*, 379 U.S. 21 (1964); and, further has correctly noted, that Section 8(a)(1) is violated, regardless of Employer's good faith that misconduct occurred, where it is shown the

misconduct in fact never occurred, *National Steel Corp.*, 242 NLRB 294, 298 (1979).

General Counsel thus contends that Respondent has failed to meet its burden on eleven named employees, including four (4) *Ken Harring, Jerry Kochn, Dave Thomas* and *Norman Vest*, concerning whom General Counsel contends no evidence of any misconduct was ever presented. It would appear by excepting exclusion of two employees (*Joe Fincher* and *William Greenfield*) that General Counsel has as much as conceded Employer was not obligated to offer reinstatement to two of the four specifically named employees Employer has contended in brief it had no obligation to reinstate because of the nature of their unlawful conduct. The parties have thus joined most direct and specific issue on reinstatement rights of *Lindsay Cundiff* and *Walter Gunn* because of their alleged misconduct. The basic test as adopted in *Clear Pine Mouldings, supra* is, "whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act."

2. The alleged incidents of misconduct

a. *Joe Fincher, Dale Guyton and Don Stevens*

Land Air supervisor Jerome M. Lynch, testified that on 13 November 1984, at 8:30 a.m. as Lynch was getting ready to back a truck in the dock at Zantop at the Municipal Airport, Joe Fincher stopped him and said, "Hey, look, if this strike goes on for any length of time, there will be some violence and some heads broken." Fincher did not testify. Michael J. Reynolds was employed by contractor Griffitts from October 1982 until March 1986. Reynolds also had occasion to drive to Zantop on 13 November 1984,

and upon arrival there at approximately 9:30 a.m. he observed Land Air employee Joe Fincher picketing. Reynolds testified credibly, and without contradiction, that upon asking Fincher what was going on, Fincher told Reynolds that they (Land Air employees) were on strike; that is wasn't going to be like the last one, and that if it went past a couple of days there'd be violence and trucks tore up; and that Reynolds had better be careful. Reynolds also testified to another statement made to him by Fincher to the effect that Reynolds didn't want to end up like Dick Griffitts. (The reference was to an occasion in the 1982 strike when Griffitts was found unconscious at a pick-up.) Reynolds could not recall the date.

Lynch testified that on 15 November 1984, before he went into a (VFW Building) stop in Kansas City, Land Air (striking) employee Ron Stevens was there sitting in his vehicle. Stevens on that occasion, told Lynch, "Look, there's going to be some problems. I don't want to get involved." According to Lynch, Stevens also said, Fincher and Guyton *is* (sic) going to meet you down at Koch. There's going to be some shit and I don't want to be around so I'm not going to be around. Lynch further testified that at 4 p.m. on 15 November 1984 (the same day) on occasion when supervisor Lynch was about to leave after making a delivery at the VFW Building, he noticed Joe Fincher and Dale Guyton in Fincher's car, side-by-side Lynch's vehicle. Lynch testified credibly that Fincher, in the driver's seat, then raised a wooden-handled, eight-to-ten inch ice pick and said, "I'm going to shove this up your ass." Lynch reported the incident immediately to the Land Air dispatcher, and at his next stop called the threat in to the Kansas City Missouri police. On cross-examination Lynch readily acknowledged that Guyton had said nothing during the incident. General Counsel further established that in the police report Lynch filed on the ice pick

incident that Lynch had *not* then mentioned Guyton. Lynch also (eventually) acknowledged that he had subsequently attended a court proceeding on the ice pick incident, and that it involved only Fincher. Guyton denied that he was present at this incident. Employer has offered no other supporting evidence of Guyton's presence.

Although I find Lynch to have been a generally reliable witness, in the instance of Lynch's recalled presence of Guyton at the ice pick incident I entertain sufficient doubt arising from the above inconsistencies to be unwilling to conclude on the status of the above evidence offering that Guyton was present with Fincher on that occasion, particularly with Guyton's unequivocal and equally apparent credible denial. Nonetheless, I credit Lynch as to his previous conversation with Stevens. (Stevens' denial did not sufficiently address particulars.) There was (I find) no confrontation of Fincher (or Guyton) later *that* day at the Koch stop, where Stevens had understood, and had forewarned Lynch the problem was to occur, and as to which problem Stevens wanted no part, and from which he disassociated himself. Lynch testified that he didn't report Stevens' satement to the police because he (understandably) did not believe Stevens was involved with the incident. However Stevens' recount to Lynch of Fincher's and Guyton prospectively meeting Lynch at the Koch stop (which did not occur) may well account for a Lynch present misrecollection of Guyton's presence at other location, as indicated by earlier documentary recording of the incident without Guyton presence. In my view, Stevens, for his part in conversing with Lynch, forewarning him of a problem, while at the same time wholly disavowing it, and disassociating himself from it, did not engage in misconduct.

Lynch has described a later driving incident. On this occasion Lynch had a security person with him. The incident involved nonemployee, but union member David

Evans, who was accompanied by Fincher. Lynch testified that Evans drove his Monte Carlo and attempted to broadside Lynch on an apparently unspecified date. Lynch reported this incident to the police in connection with a later Monte Carlo (blocking) incident involving another driver. However in this instance the police arrested both Evans and Lynch, Lynch testifying that it was because it was one person's word against the other. (Apparently it was two against two. Otherwise there is no explanation offered as to the apparent noninvolvement of the security person as a witness for Lynch (or Fincher as witness for Evans). In any event Lynch testified that neither he or Evans pressed charges on this incident.

Lynch has also testified to his discovery of four ice picks in the tires of his Land Air vehicle after a stop, on an unidentified day; and also, to similar damage to his vehicle, along with smashed windshield damage, at his home, in early December 1984. In neither incident did Lynch have any knowledge of the perpetrator(s).

Jimmy McDonnell was employed by Lynch and drove Lynch Delivery's one vehicle. McDonnell testified that on 4 December 1984, a red and silver Chevrolet truck pulled up behind him while McDonnell was waiting at a stop in Kansas City "on standby." Fincher drove the car which was owned by Lindsay Cundiff. McDonnell testified that Evans and another striking employee were riding with Fincher. McDonnell confirmed it was not Cundiff. They got out of the vehicle and began picketing McDonnell's vehicle. McDonnell relates that Fincher, after signalling McDonnell to roll down his window, asked McDonnell why he didn't get out of the truck. McDonnell did not reply. Fincher bent the rear (or side) view mirror down, without damage. McDonnell radioed the Land Air dispatcher to call the police. The police arrived and warned Fincher and the other about tampering with McDonnell's vehicle.

McDonnell then received a pickup call. After arrival at the stop, making the pickup and placing it in the van, McDonnell got in the van. At this time McDonnell's father was with him in the van. As soon as McDonnell started up the van, an (unidentified) projectile shattered the back window of the van, and left a small hole in the back of the front passenger seat. McDonnell quickly turned around and saw Evans run into an alley that McDonnell knew to be an "L-shaped" alley. McDonnell drove his van to the other end of the alley, arriving in time to see Fincher pull out, and with Evans as passenger. McDonnell confirmed Cundiff was *not* in the vehicle.

James Ellis was employed by Land Air as a driver from 29 November 1984 to mid-1985 when he became a dock supervisor. Ellis relates that on 10 December 1984 he drove a truck to a stop. Ellis saw three individuals walk to the truck. One hit a door, and Ellis saw Fincher hit a tire. Ellis ran around the truck, and he observed Fincher walk to an alley and throw an ice pick. Ellis called the police; and when they arrived, Ellis showed the police the hole in the tire, and he then directed the police to the ice pick. Ellis (and McDonnell) were summoned to criminal proceedings against Fincher. Ellis testified that Fincher pled guilty; and Employer presented in evidence confirming certificate of the Sixteenth Judicial Circuit, Kansas City Municipal Division.

On the same day, 10 December 1984, McDonnell was driving with security rider Gary Genova. A Chevrolet "blazer," belonging to Stevens followed them. In the car were Fincher, Evans and an unidentified individual. McDonnell and Genova got out of their vehicle, as did Fincher and the others. McDonnell went into the stop (Casey Southern) and brought the freight back out. McDonnell observed Genova talking to the three individuals. As McDonnell approached Genova, Genova requested that he call

the police. McDonnell did, and when they arrived, the police arrested the three men in the Chevy "blazer." McDonnell however did not observe the incident; and Genova did not testify.

It cannot be gainsaid that there is sufficient evidence presented that Fincher engaged in misconduct disqualifying his reinstatement, based on Fincher's threats of general violence to Lynch and Reynolds on 13 November 1984; threat of personal injury to Lynch on 15 November 1984; veiled threat of physical harm to Reynolds of the same nature as Griffitts in prior strike; and Fincher's personal involvement in ice pick damage to Ellis' truck tire. It is so found. In contrast there is in my view insufficient evidence presented as to any misconduct sufficient to disqualify either Dale Guyton, or Don Stevens.

b. *William Greenfield*

While there is some conflict as to date, it is clear and I find that the following incident occurred on Ellis' first day of employment, 20 November 1984. Ellis otherwise testified credibly that he was followed by William Greenfield and another individual to a furniture store where Ellis delivered some mattresses at the dock. As Ellis came out of a dock door and walked to the front of the truck he heard air escaping from the tires of the truck; and he observed Greenfield getting back into his orange truck. On inspection of the truck, Ellis discovered 3 tires had been vandalized. In his testimony, Ellis evidenced difficulty initially in remembering Greenfield's name; and, on cross-examination he also acknowledged that the name had been later supplied to him by the dispatcher after Ellis had described the man he saw getting back into the orange truck.

Ellis also testified that on 17 December 1984, Greenfield and another person, whose name Ellis did not know, were again following his truck. Greenfield was driving the

truck; and Tom Pope accompanied Ellis as security rider. When Ellis stopped at an intersection he observed the other person accompanying Greenfield get out of the truck behind. Ellis, who had previously had his truck padlocked, immediately got out of his own truck, and ran to the back. Ellis found a padlock had been placed on the back door. Not having a key to this padlock, Ellis had to get the lock cut off; and resultingly, it delayed his deliveries.

Ellis testified that he was summoned, and did testify on 3 September 1985 in criminal proceedings brought against Greenfield. On that occasion Ellis testified about the furniture store incident involving damage to 3 tires. Respondent has also placed in evidence records of a conviction by a jury in the District Court of Johnson County, Kansas, Criminal Department. The conviction was of criminal damage in an amount (finally) of less than $150, a Class A misdemeanor. (Speak recalled this conviction as one on appeal. Employer introduced records showing there was a motion for a new trial that was denied. There is no other record evidence presented of an appeal.) The sentence imposed was a year, and fine of $1000; and Greenfield was placed in bench probation for a year. Greenfield did not testify in this proceeding. It is apparent from the above furniture store incident (alone) that Employer had sufficient grounds to conclude that Greenfield is disqualified from reinstatement by virtue of his misconduct in connection with damage to property at the furniture store.

c. Lindsay Cundiff

It appears that the major dispute of fact, or at least the most difficult for resolution in this area, occurs in relation to Cundiff, and his personal responsibility in certain incidents. Schneller, Jr. testified that at 8:30 a.m., on 13 November 1984, the first day of the strike, the left the dock to run downtown deliveries, and was followed by a

rust-colored Monte Carlo (belonging to Evans). Striking employee Lindsay Cundiff and nonemployee David Evans were in the Monte Carlo car. Cundiff picketed Schneller's vehicle at Schneller's first stop, but could not do so on the second stop because Schneller had parked the car inside the customer's property. Schneller's third stop was at an office building. Schneller got out of his van to make a delivery, locking the vehicle. Schneller crossed the street, and began walking down a 70′ walkway to the entrance of the office building. According to Schneller, about halfway down the walkway he looked back over his shoulder and observed Cundiff, holding a picket sign, place a leg on the van's front bumper. Prior to entering the building Schneller next observed Evans go to the right rear tire of the vehicle, and bend over for a couple of seconds, and then go to the front tire and bend over for a couple of seconds. Schneller observed Cundiff and Evans then walk back to their vehicle. Schneller ran back across the street, but by the time he reached the van, Cundiff and Evans had left. Schneller then observed the two tires at which Evans had bent over had holes in their sides and were flat. Schneller called the police. Schneller testified that the only thing he knew is that the police went up to the picket line at Emery to investigate. Schneller did not know the result, but felt it had to do with his word against their word.

Cundiff testified that he never met Evans before, and that Speak assigned Evans to him to help with Cundiff's picketing on the first day. Evans was to drive, and Cundiff picket. Cundiff confirmed that he drove with Evans in Evans' car (a Monte Carlo); and that they had followed Schneller's van. However, Cundiff recalled they followed Schneller through about 10 stops. Cundiff related that it was about 10:15 a.m. (though he was unsure of the exact time) that they were at the (office building) stop in Kansas City, Missouri. Cundiff confirmed that he got out and

walked to the front of the van, but asserts he stood 6' in front as he was supposed to do, and he displayed the picket sign, while facing the four lane street; and he could observe Schneller. According to Cundiff, Schneller had taken some envelopes, crossed the street and Cundiff observed Schneller go *inside* the building. (On cross-examination Cundiff also denied that Schneller had looked back.) Evans, whose practice had been to stay in the car, this time had gotten out of the car, but Cundiff testified that to his knowledge Evans did not do anything. Cundiff recounts that Evans stood on the sidewalk, along beside the van. Evans did not talk to Cundiff at the time. Cundiff picketed roughly 5-6 minutes. According to Cundiff, Evans then said, "Let's go back up to the picket line." On cross-examination, Cundiff added that Evans said, "Let's go back and follow another truck. We're not doing any good here." Cundiff testified that Schneller was still in the building at the time they left. Cundiff denied that he saw Evans bend over at any time; denied that he heard air escaping from tires; denied the tires were flat when he left; and denied that he saw any damage done to the van. Cundiff specifically denied seeing Evans do any damage to the van. They got back in the car, and they went back up to the picket line. Cundiff confirmed he was questioned by the police concerning the office building location visited on 13 November 1984. According to Cundiff, the police said there had been an incident reported of some flat tires on a van in the 2300 block of Grand (the office building); that he was questioned in front of Evans, and he told the police that he didn't know anything about any flat tires; that the police took his vehicle (and driver) license numbers, and called it in, and that was all; and that to his knowledge, the police did not make out a report.

Cundiff testified that he did not go out with Evans again on ambulatory picketing. He asserts he was never

assigned to Evans again; and it was not that he refused. Cundiff otherwise testified that he did loan his own personal car (a red Chevrolet pickup), one time, to Evans in December, 1984, because neither of the cars of Evans or Fincher were runing very good that day (and explaining on cross-examination that he was on picket line duty at Emery that day). Cundiff also testified that he did not know who they were going to follow, or what their plans were for that day, except, on cross-examination he readily acknowledged he was aware that they would be following cars. (Fincher was driving Cundiff's car at the time of the McDonnell projectile-window smash incident, *supra*.) On cross-examination Cundiff denied that Evans had ever displayed an ice pick to him. Cundiff also testified that nothing was said when they returned his car to him, nor was there a police investigation of an incident that day.

Analysis

As I have noted earlier, Schneller, Jr. did not impress me as exhibiting complete candor in his testimony on the subject of his knowledge of drivers of contractors that Land Air engaged, and for whose services to Land Air Schneller regularly made payment. On the other hand, it is equally clear to me that Schneller did not make up this two-tire damage incident at the office building out of whole cloth. Cundiff has confirmed there was a police inquiry made on the incident the same day. That such damage was done is not the issue. The direct conflict is over whether Schneller observed Evans' and Cundiff's actions, or went inside the building, in which event it would then be indicated that he returned to find the damage to the vehicle that he knew Cundiff and Evans had followed and picketed. In final analysis, I simply do not believe that Schneller made up an observation of Evans and Cundiff, for if he was disposed to do so, it seems to me it would appear far more

likely that he would have attributed the perpetration to Cundiff, or at least both rather than only to nonemployee Evans. Moreover, I cannot overlook the plausibility of a prosecutorial consideration of effect of a two-against-one interest version.

This was not the only conflict between Cundiff and Schneller, Jr.. Recall Schneller's version of Cundiff June calls, with asserted Cundiff statements made of his, and 90% of the men's sole interest in getting the money due, and noninterest in return of himself, or others to work, excepting Fincher, concerning whom Cundiff then reportedly said (plausibly on this record) none of the employees wanted anything to do. Moreover, Schneller's version appears the more plausible, following as it did the first charge dismissal; and it is congruous as well with the nature of Employer's evasive response to Speak of same date, or failure to clarify thereafter. (The later pursuit of negotiations by Employer itself is not incongruous with an interim bargaining approach by Union, and resumed striking.) Cundiff's recollection of Schneller assertion at that time that the checks were in the hands of the attorneys in contrast appears less convincing, it being apparent both sides were still in disagreement over the amount due. In any event, I find Schneller's version is the more generally reliable.

There is more significantly the change in statement attributed to Evans for their departure to be considered. Then too there is the timing of the abrupt break off of picketing, at the very location where damage is done, with an explanation offered, but which is then shown to be not without its own strain (acknowledged awareness or further stops to be made by Schneller, and indefiniteness of further patrol opportunity that day), which fosters less persuasiveness. Finally, I simply had a general impression from observation of Cundiff on the stand that while he was

caught up in events that may well not have been of his own initiative; he was struggling with his explanation of circumstances that he knew would indicate otherwise, but did so without embracing the one possibly saving feature of a full and complete candor in these matters. On the credible evidence of record before me I cannot say that the evidence that Employer has presented was not substantial, believable, and clearly sufficient for Employer to have concluded in good faith that it had no obligation to reinstate Cundiff because of an apparent willing participation by him, if not before, then after the fact of indicated Evans' damage to an Employer van. Evans did not testify. Contrary to General Counsel, police report existence, or nonexistence was as available to General Counsel to support Cundiff, as to support Employer. I decline to draw adverse inference in those circumstances, particularly with Cundiff acknowledgment the police had made an inquiry on property damage. Moreover with Employer's awareness of that police investigation at the picket line, and of its subsequent awareness of Cundiff's loan of his personal car for use by the same Evans, and by Fincher whom Employer knew beyond question had previously engaged, and who did use the car in engagement of additional impropriety, I cannot conclude Employer was not reasonable in view that such was assistance and/or indicative of Cundiff's approval of prior wrongful conduct in ambulatory picketing at which Cundiff was present. In short I am led to conclusion that Employer on the one hand has established "reasonable cause" for its action, and that General Counsel's evidence offered thereon simply has not convinced me of Cundiff's actual noninvolvement, or clear disavowal. Cf. *Roadway Express, supra*, 250 NLRB at 394; and on respective burdens *National Steel Corp., supra*, 242 NLRB at 298. Though I am not without reservation in the matter, it is concluded and found

on weight of evidence that Employer had no obligation to reinstate Lindsay Cundiff on or after 9 April 1985.

d. *Walter Gunn and Walt Malinowski*

David Nelson, employed by contractor Rinehart, was assigned to run striking employee Walter Gunn's route. Nelson testified that in the early days of the strike Gunn followed him. On other occasion he testified they didn't have to follow him all the time as they knew where he was going. Although Nelson described an early radiator damage incident there is no evidence of union, or union agent causation or involvement in this incident, let alone specifically by Gunn. Nelson described another incident initially placed in November but later early December, 1984. Nelson at this time was accompanied by a female security rider, Leslie Ober. Nelson was to make a delivery at a Johnson Drive building. Nelson relates he was being followed by Gunn (and another person) in Gunn's vehicle, and also by a black S-10 Blazer. Both pulled up behind him at his stop. Nelson instructed his security driver to keep their vehicle moving, and to drive around, as he made the delivery. Nelson observed the security driver pull out. On his return, Nelson testified (initially) that he observed his security driver had been *stopped;* that one vehicle was in front; but (inconsistently with a blockage) that they *both* were just leaving, thus indicating the vehicle in the rear had passage way. As he approached his vehicle he found one tire was losing air rapidly from a puncture in the side wall. The security rider, Ober, did not testify. Nelson later at one point appeared to recall that Gunn's vehicle was *in front* and leaving when he came out, but on later occasion asserted that it was the blazer in front. This offered evidence does not convince me that Gunn was responsible either for a passage blockage, or for any tire damage.

Mike Reynolds, employed by contractor Griffitts testified that one *night* at 6-7 p.m. after leaving the Land Air facility an Escort wagon followed "right on my bumper" while Reynolds drove I-29 at 70 miles per hour. Reynolds could not identify the driver, but he identified Gunn in the passenger side. Reynolds testified that the car on one occasion passed him and swerved at him a couple, or 3-4 times, trying to run him off the side of the road. Reynolds also recounts that during the same event the car pulled beside his vehicle and Gunn motioned for Nelson to roll down his window, which Nelson did. Gunn then said to Nelson (who is not black), "pull over, nigger, we got something for you. We're going to give you something." Reynolds testified he took this as a threat and "just sped away." Gunn did not testify. It requires no great analysis to conclude that a high speed chase of one alone at night, coupled with repeated reckless vehicle approach, is likely to be at best intimidating, and visitation of the statement attributed uncontestedly on this record to Gunn upon anyone, but pejorative in those circumstances. Employer had no obligation to reinstate Gunn. I continue with Gunn incident only as it may reflect on others.

McDonnell testified that at some point during the strike he had a conversation with Gunn at the picket line at the Emery facility. According to McDonnell, Gunn pulled him over and told McDonnell, "I'd better watch it, that they are going to get me." Striker Malinowski was present, but off in a parked car. McDonnell testified (essentially) that Gunn made the statement in a normal tone of voice given the road conditions. More significantly McDonnell testified no one followed him away from the picket line on this occasion. There is, in my view, a complete lack of evidence that striker (and steward) Malinowski was aware of, or otherwise involved in any way with this statement, or its reasonable coercive portent.

Reynolds also testified as to an occasion when all four tires of his vehicle were flattened at his home. Because he knew Fincher was aware of the location of his home, Reynolds suspected Fincher. In any event, Reynolds went to the picket line and found Malinowski there. Reynolds told Malinowski, "My tires have been flattened and I think it was Joe Fincher." Reynolds further told Malinowski, that if he wanted to mess with me or my truck at work, that's one thing, but stay away from my house where my wife and child were. Malinowski made no response to either of Reynolds' comments.

Reynolds testified that he picked up nails in his tires while driving the road entrance to Emery, and (overall) had to have 10-12 flats fixed. Reynolds has testified that there was an occasion when he observed about 20 to 30 three-inch roofing nails in and across the driveway at the Emery facility. Reynolds stopped to pick up the nails. Malinowski was present, beside the driveway, leaning against his car. On that occasion Malinowski walked over and said to Reynolds, that was a present from Sloan. Reynolds initially identified Sloan as a Land Air driver, but then agreed he was a contractor.

Speak has testified that he did very little ambulatory picketing; that he was at the picket line almost every day for (at least) the first few weeks, but not every day; that he had no knowledge of nails in tires of Land Air trucks; but that he had knowledge of presence of roofing nails where the pickets regularly parked their cars, and that on 2-3 occasions he had personally had to fix flats, as did others. (Speak also denied any *personal* knowledge of Employer's vehicles being punctured with ice picks, and windows shot out of trucks.) The Employer and General Counsel are at odds about a statement of Speak's picket line control, purportedly made by Speak to President Schneller in the *prior* strike. I need not address that, as

the Union has certain burdens in running a present picket line, irrespective of such a statement, if made in the past.

There is otherwise no evidence offered of Malinowski's personal or direct involvement in *any* misconduct. Specifically, there is no evidence of record that anyone ever saw Malinowski place any nails in the roadway entrance to Emery facility. There is no showing that nails were in the entrance way on successive days. General Counsel argues that in the absence of evidence that Malinowski placed nails in the driveway that day, or evidence of Malinowski picket line involvement in some pattern of presence of nails in the driveway, it cannot be assumed Malinowski was responsible, for the presence of nails in the roadway this particular day. Though Malinowski did *not* testify, in general I agree with General Counsel's position. But see and compare where inference *is* warranted of union responsibility as where there is direct evidence of a (former) picket's involvement in strewing nails in a driveway entrance, and there has been a sufficient day-to-day pattern of presence of nails in the entranceway near picketing area, to make the Union responsible, *Avis Rent-A-Car System, Inc.*, 280 NLRB No. 60, fn. 3 (24 June 1986).

The only arguable issue otherwise is did Malinowski's unsolicited (and uncontested) comment clearly reveal previous awareness there were nails in the driveway that day, and if so, is Malinowski then placed under some affirmative duty to himself have policed the area on this day, and removed them. I need not reach the latter issue on the record evidence before me. Malinowski did not make the comment until he approached Reynolds who had already stopped to pick up the nails. Given the record of evidence of first notice by Reynolds, and as it would appear unlikely Sloan, a contractor using the driveway entrance, would place the nails there, I conclude the comment is more inferable as a smart remark, than inferable of Malinowski

prior knowledge and approval of nails being in the roadway. As noted, there is no direct evidence that any union picket, placed nails in the entrance, and I will not speculate Malinowski did so on this occasion. Under these circumstances, this comment as to source (as opposed to a clear admission of union, or union agent placement of nails in the roadway) in my view was not serious enough misconduct to warrant a forfeiture of Malinowski's right to return to employment as a lawful economic striker at the conclusion of the strike. Employer would appear in brief not to have strenuously argued it was. In any event, it is found it is not. Malinowski, I find, was entitled to reinstatement.

e. Mike Carleton and John Farris

Reynolds had a conversation with Carleton on the picket line in late November, 1984. Reynolds testified that Carleton, who was a friend of his, was alone on the picket line at the time. After Carleton asked Reynolds how it was going, Carleton then told Reynolds, "I'd better watch out because there were some people here from the union hall and they didn't know one driver from the other, whether I was driving in town or what, and that I'd better be careful. Reynolds was an out-of-town driver at the time. Reynolds testified that he did not consider Carleton's statement was made to him in order to threaten him. Carleton did not testify. There is no other evidence indicative of *any* misconduct by Carleton. This is a close question because the test is not whether a given individual is actually coerced, but whether under the total circumstances a statement or act reasonably tends to coerce, or to intimidate employees, *Richmond Recording Corp., supra.* These two individuals were friends. There were no other employees in the immediate area, as Carleton had come over to talk to Reynolds privately. In my view Carleton's statement

is reasonably to be viewed as intended and understood as privately informative, between friends, and not coercive.

The only evidence offered as to Farris is on an incident occurring well after 9 April 1985, some time in June, but necessarily following the resumption of the picketing which occurred on 22 June 1985. On this occasion Reynolds started a conversation at the picket line with Farris, asking how it was going. Reynolds recalled Farrisn then said, "Not too good. This is going to be your last two weeks because we're going to break Land Air, so you'd better enjoy your last two weeks." General Counsel appropriately would have observed that no strike misconduct had occurred for approximately 5 months. It is concluded the above remark is not reasonably to be viewed as coercive, but at best expression of "bravado" opinion. Employer has not established that Farris engaged in any prior strike misconduct.

f. *Ken Harring, Jerry Kochn, Dave Thomas and Norman Vest*

In agreement with General Counsel's observations, there appears to be no discernible evidence offered in support of strike misconduct by these striking employees.

g. *Employer's proffered evidence of damage by unidentified individuals*

In each of the following incidents there was no evidence produced of actual perpetrator. Schneller, Jr. testified that a couple of days after the strike commenced Employer's tower transmitter was vandalized in that both the power line and the antenna line were cut, with damage estimated at between $600 to $1000. (Employer lost its communications for an undisclosed period of time.) Nelson, employed by contractor MKT, testified to finding his (personal) keys and certain work papers missing from his

truck for a period of time (and then returned) on 14 November; and also, that he had two tires and a radiator punctured in late November, 1984. McDonnell, employed by Lynch Delivery, testified that he had one tire punctured, and one tire found with a nail in it on 3 December 1984. Roger Williams, employed by contractor Thatcher, testified that he had two tires of his vehicle punctured (as were two tires of Thatcher's other vehicle parked nearby) on 10 December 1984. As noted, supervisor and contractor Lynch found ice picks in four tires of his (Land Air) vehicle one (unspecified) day: and he had similar tire damage, and a smashed window of his (own) vehicle, at his home, in early December. As noted, Reynolds, employed by contractor Griffitts, testified he had all 4 tires of his vehicle flattened at his home on 10 December 1984. Schneller confirmed he never got a flat from nails in the driveway, but testified several business associates and customers did. None of the above, by evidence of Record is directly attributable to the Union, or to any of its agents.

Employer had insufficient evidence of employee misconduct to support its failure to reinstate the following named employees upon their unconditional offer to return to work, namely:

Carleton, Mike	Harring, Ken	Stevens, Don (Ron)
Farris, John	Koehn, Jerry	Thomas, Dave
Guyton, Dale	Malinowski, Walt	Vest, Norman

However, I have found on the basis of certain specific individual incidents of employee misconduct above that Employer did not violate the act in its failure to reinstate the following named employees:

Cundiff, Lindsay	Fincher, Joe	Greenfield, Bill
	Gunn, Walter	

The Employer has established that these striking employees engaged in misconduct. The Union's identified stewards

were Farris and Malinowski; and if the Union had regular picket captains otherwise that fact does not appear sufficiently clear of record. Speak, who was present at the line frequently, is not contended to have engaged in improper conduct. There is no direct evidence that the Union, or its authorized agents engaged in specific unlawful conduct, let alone engaged in violent tactics, or irresponsible physical assaults. The misconduct of employees, nonemployee and by anonymous individuals does not call for application of principles of *Laura Modes Co.*, 144 NLRB 1592 (1962). The Board will not deprive unit employees of their majority representative because of the misconduct of a few employees. The misconduct herein determined to have occurred was in relation to four of 13 unit employees, and such, in my view, did not rise to a level warranting invoking *Laura Modes* sanction of the bargaining representative of the remaining unit employees who did not engage in misconduct, *Honaker Mills*, 273 NLRB 1246, fn. 2 (1984).

Conclusions of Law

1. Respondent, Land Air Delivery, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Teamsters Local 41, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent Employer constitutes an appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All truck drivers and warehousemen employed by Land Air Delivery, Inc. at its delivery service located at Kansas City, Missouri, but Excluding independent con-

tractors, office clerical employees, guards, and supervisors as defined in the Act.

4. Since 14 December 1973, the above-named organization, Teamsters Local 41, has been the designated exclusive representative of the employees in the aforesaid appropriate unit described above in paragraph 3, for the purpose of collective-bargaining within the meaning of Section 9(a) of the Act.

5. Respondent Employer and Teamsters Local 41 were parties signatory and/or subject to the National Master Freight Agreement, Over the Road and Local Cartage Carriers with duration from 1 March 1982 through 31 March 1985.

6. On 13 November 1984, all Land Air employees in the above appropriate unit represented by Teamster Local 41 commenced a lawful economic strike over certain grievances.

7. Respondent Employer thereupon continued to run its air freight operations by employing independent contractors, replacement employees and office staff and/or supervisors.

8. On 28 January Respondent Employer gave timely notice to Teamsters Local 41 that it desired to cancel and terminate the National Master Freight Agreement, together with Central States Area Local Cartage Supplemental Agreement, as of its termination date 31 March 1985; additionally informed ~~the~~ Union that Employer would no longer be a member of any Employer Association or any Bargaining Group in the negotiation of a new contract; and that it would not be bound by any contract negotiated by an Employer Association.

9. In period commencing 20 February, and ending 1 March 1985, and while all striking unit employees remained on strike, Respondent Employer permanently sub-

contracted all unit positions to independent contractors, without any prior notice to the Union, and without affording the Union as the exclusive collective-bargaining representative of the above unit of employees an opportunity to negotiate and bargain thereon, thus acting unilaterally, and in violation of Section 8(a)(5) and (1) of the Act.

10. On 9 April 1985, and thereafter, Teamsters Local 41, on behalf of all employees, offered unconditionally to return to employment with Employer.

11. Since 9 April 1985, Respondent Employer failed and refused, and has continued to fail and refuse to reinstate the following employees in the above unit because they engaged in a strike, in violation of Section 8(a)(3) and (1) of the Act.

Carleton, Mike	Harring, Ken	Stevens, Don (Ron)
Farris, John	Koehn, Jerry	Thomas, Dave
Guyton, Dale	Malinowski, Walt	Vest, Normen

12. Respondent has not in any other manner violated the Act.

III. The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The General Counsel seeks a remedial order whereby Respondent Employer shall reinstitute, honor and apply the terms of the collective-bargaining agreement that expired on 31 March 1985. I have found that Respondent violated Section 8(a)(5) and (1) of the Act, by unilaterally permanently subcontracting all the unit positions to independent contractors in the period 20 February - 1 March 1985, thus *prior* to contract termination. It is apparent therefrom that Employer not only ceased observing the wages, and other terms and conditions of the existing con-

tract as early as 20 February 1985, but that it continued to cease observing the existing wages, hours and working conditions thereafter, e.g. upon termination of the contract on 31 March 1985. In that regard, Employer's notice of desire to, and an actual termination of the NMFA contract on 31 March 1985, did not serve to then sanction Employer's earlier unilateral change of the existing wages, hours and working conditions of unit employees by prior permanent subcontract without bargaining with the Union. Rather, Respondent continued at end of contract to be obligated to maintain the existing *employee* wages, benefits, hours, working conditions and terms of employment, pending a union (albeit on strike) refusal to meet and bargain upon Employer request for change, a bargaining impasse, a new agreement, or union waiver, or union interim consent to Employer desired change(s). In order to dissipate the effects of these unfair labor practices, it *is* necessary to order a restoration of the *status quo ante*, to the extent feasible, absent evidence of an Employer showing that to do so would impose an unfair burden upon Respondent, cf. *Fibreboard Paper Products*, *supra*, 379 U.S. at 215-216, and see fn. 10 *id.* 216. On the evidence Employer has presented in this proceeding, Employer has not demonstrated that, though it may still raise additional matters for consideration ~~in~~ the compliance stage, if there are any, and it desires to do so. *Richmond Recording Corporation*, 280 NLRB No. 77, Slip Op. (24 June 1986); and see also the discussion, and Board and Court cases cited in ALJ Decision *id.*, at p. 98-99 on make whole remedy.

In that regard, I have also found that Respondent subsequently unlawfully failed to reinstate 9 unit employees, on and after 9 April 1985, in violation of Section 8(a)(3) and (1) of the Act, but that it did not violate the act by its failure to reinstate four other unit employees. Having had their unit positions unlawfully subcontracted to others

during the strike, those unit positions, for remedial purposes, remained open. Upon the conditional offer to return to employment on 9 April, the nine employees were entitled to an immediate reinstatement to their former positions. I shall recommend that Respondent Employer be ordered to resume its prior (appropriate) unit employees' pick-up and delivery service operations to the extent now possible; and that it offer these 9 named employees unlawfully denied reinstatement an immediate and full reinstatement to their former positions of employment, or, if any of those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges; and further, that Respondent Employer make them whole for any loss of pay, *including* fringe benefits, that they may have suffered as a result of Employer's failure to timely reinstate them upon their unconditional offer to return to work on 9 April 1985. The backpay period shall thus run from 9 April 1985, the day on which they were unlawfully denied reinstatement, until Respondent's offer to reinstatement shall occur (if it has not already done so), less any net earnings during such period. Backpay and interest shall be computed in the manner prescribed in *F. W. Woolworth*, 90 NLRB 289 (1950); and *Florida Steel Corp.*, 231 NLRB 651 (1977).[6]

The General Counsel has additionally requested, on the particular circumstances of this case, *inter alia*, that Respondent be ordered: (1) to terminate any arrangement for subcontracting of pick-up and delivery work that did not exist on 13 November 1984; (2) to cease and desist from any increasing, in any manner, hours of work assigned to subcontractors, the number of subcontractors, or employees of subcontractors; (3) that Respondent restore the unit to its numerical status to the strike, namely 13 full-

[6]See generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962).

time positions, dismissing subcontractors and their employees if necessary; and (4) to employ unit employees to perform all pick-up and delivery work with the exception that independent contractors, and their employees under contract, or employed 13 November 1984 may continue to perform unit work in the event work is available after 13 unit positions are filled. It may be noted that the independent contractors named herein, were not made a party to this proceeding. I see no reason to so restrict the size of the unit if there is to be full remedy, without punitiveness visited upon Employer's other operations.

In my view it will thus be sufficient remedy to presently order that Respondent Employer shall continue to recognize and bargain with the Union as the exclusive representative of the above described unit of employees which remains appropriate for collective-bargaining purposes; that Respondent Employer cease giving effect to those certain independent contracts which it unilaterally entered in the interim during contract duration in the period 20 February through 1 March 1985, insofar as the same have been engaged for use, and have performed as permanent subcontractors of unit positions that union represents; that Respondent reinstitute the wages, hours and working conditions of unit employees as they existed prior to entry of the above independent contracts, and as they existed as of termination of the NMFA contract on 31 March 1985, under existing Board precedent; that Respondent be ordered not to refuse to bargain with the Union as the exclusive representative of such unit employees; and that Respondent Employer be ordered not to subcontract any unit positions without first bargaining with the Union thereon. However, it seems to me that to go presently beyond that is to needlessly speculate, e.g. on whether the size of the unit work of employees has stayed the same as it was prior to the strike of 13 November 1985, or has expanded, e.g., through normal

course of increased business operations, or has decreased through some nondiscriminatory exigency of the strike itself (e.g. as in a potential permanent loss of one work position related to General Motors' Leeds facility). In my view there are all matters that may await any required addressment and refinement in the compliance stage. Suffice it to presently make clear in the remedy being provided that any increased use of contractors by Employer on *unit work* on and after 13 November 1985, was essentially as replacements to perform unit work during the strike; and that Employer's claimed permanent subcontracts entered by Employer in the period 20 February - 1 March 1985, and which have been found unlawful, are not to be construed, for remedy purpose as effective permanent subcontracts. In short unit positions were not thereby eliminated, but continued in existence and were unfilled by replacement employee as of 9 April 1985. I need not reach whether in other circumstances, e.g. had Employer only raised claim herein that the subcontracts were just temporary (noting they were cancellable on 30 days notice), the same would have effected the start of backpay period in some reasonable measure. Temporary subcontracting with contractual duration beyond strike end was not Employer's claim in *this* proceeding. Respondent Employer did not timely return to employment any employee that engaged in the strike. Neither did Employer contend the individuals it entered independent contracts with during the strike were not independent contractors, but permanent employee replacements.

Finally, General Counsel has also requested that Employer be ordered to maintain complete, accurate records on a daily basis, establishing the number, and identity of all subcontractors performing *any* pick-up and delivery work, the number of hours of work each contractor performed, the number and identity of each employee employed

by a subcontractor to perform pick-up and delivery work, and the number of hours each paid employee worked, and make these records available to the Union upon request. It is apparent from record evidence presented herein that Employer does keep daily records relating to the business it performs for its major customer, but apparently has not kept such records in that form on business for its other customers. The records it has kept reflect the revenues generated by contractors, and contractor drivers and the number of pickups and deliveries daily. However, it does appear that since 13 November 1984, Employer has not kept track of hours worked (at least in the record form in evidence), though the record does reveal that unit employees prior to the strike regularly punched a timeclock, (and see in that regard, Article 26, p. 62, NMFA, G.C. 9). Unit employee drivers were paid by the hour (see Article 60, Central States Cartage Supplemental Agreement, p. 115, G.C. Ex. 9).

This case did not involve a complaint allegation that the Respondent had failed to supply data relevant and necessary for Union's performance as exclusive bargaining representative of unit employees. The issue General Counsel raises relates to backpay formulation. Given the number of formulas available to General Counsel to formulate gross backpay, including projection, from an individual's past, or group payment experience, and given the specification nature of Employer's own burdens to contracontend on formula in that regard as clearly set forth in the Board's Rules and Regulations, Section 102.54, it does not appear to me that the Board's normal requirements as to maintenance of adequate records is not sufficient. Although the Respondent Employer was not open and candid with the Union about its permanent subcontracting, in my view it is questionable whether that would be a sufficient basis alone to call for imposition of the "visitorial order" Gen-

eral Counsel also seeks. However, it does not stand alone. First, it is observed that certain of the terms of the terminated contract required, and under the remedial order will require recording of hours worked. It will also be required that Respondent keep records of manhours expended in each contract, "arguably involving bargaining unit work," *Amcar Division* v. *NLRB*, 596 F. 2d 1344, 1353 (1979). Beyond that, I shall decline to recommend that Employer be directed as to how it shall run its business. However to assist General Counsel based on any resulting possibility of complexity developing in the computing of the make whole remedy herein provided, and under all the facts of the case, I shall recommend the board provide for an appropriate "visitorial clause." *Hilton Inn North*, 279 NLRB No. 9, Slip Op. p. 92, fn. 3, (31 March 1986).

Upon the foregoing findings of fact, conclusion of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[7]

The Respondent, Land Air Delivery, Inc., its officers, agents, successors, as assigns, shall:

1. Cease and desist from:

(a) Unilaterally subcontracting unit work and/or unit positions on a permanent basis, or otherwise unilaterally changing the wages, hours, and other terms and conditions of employment of unit employees, during a strike or other-

[7]In the event no exceptions are filed as provided in Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

wise, without providing prior notice and opportunity to bargain to Teamsters Local 41, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other union the employees may select as their exclusive bargaining representative.

(b) Refusing to reinstate the below named former striking employees who have been determined herein to have not engaged in any disqualifying strike misconduct, and to have been entitled to an immediate reinstatement upon their unconditional offer to return to employment on 9 April 1985, namely:

Carleton, Mike	Harring, Ken	Stevens, Don (Ron)
Farris, John	Koehn, Jerry	Thomas, Dave
Guyton, Dale	Malinowski, Walt	Vest, Norman

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

(a) Reinstate the pickup and delivery service previously performed by its unit employees represented by the above named Teamsters Local 41; offer to the above named employees an immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges; and make them whole for any loss of pay suffered by them, in the manner set forth in the section above entitled "The Remedy."

(b) Bargain collectively with Teamsters Local 41 as the exclusive bargaining representative of Respondent's employees in the below described appropriate unit herein with respect to wages, hours, and other terms and conditions of employment, namely:

All truck drivers and warehousemen employed by Land Air Delivery, Inc. at its delivery since located at Kansas City, Missouri, but Excluding independent contractors, office clerical employees, guards, and supervisors as defined in the Act.

(c) Restore and place in effect, retroactive to 1 April 1985, all the wages, hours, rates of pay, and all other terms and conditions of employment of the above unit employees, (excepting as may be allowed by law, union security, check-off, arbitration,[8] and nonmandatory bargaining subjects) as provided by and established in the collective-bargaining agreement that terminated on 31 March 1985; and maintain same until such time as Respondent Employer and Teamsters Local 41 bargain in good faith to impasse, execute a new collective-bargaining agreement, or the Union refuses to bargain, or waives bargaining.

(d) Preserve, and upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze Respondent's obligations to reimburse employees for benefits and wages lost as a result of the above-described unfair labor practices.

(e) Post at its service facilities located in Kansas City, Missouri, copies of the attached notice marked "Appendix."[9]

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[8]But see potential of open question on certain aspects of arbitration survivability. *Ground Breakers, Inc.*, 280 NLRB No. 14, fn. 2 (30 May 1986).

[9]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Copies of said notices, on forms provided by the Regional Director for Region 17, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 17, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith. For purposes of determining or securing compliance of this Order the Board or any of its duly authorized representatives may obtain discovery from the Respondent, its officers, agents, successors or assigns, or any other person having knowledge concerning any compliance matter, in the manner set forth by the Federal Rules of Civil Procedure. Such discovery shall be conducted under the supervision of the United States Court of Appeals enforcing this Order and may be had upon any matter reasonably relating to compliance with this Order.

Dated, Washington, D.C. 30 September 1986

(s) Robert G. Romano
Robert G. Romano
Administrative Law Judge

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

AFTER A TRIAL IN WHICH ALL SIDES HAD AN OPPORTUNITY TO PRESENT EVIDENCE AND STATE THEIR POSITIONS, THE NATIONAL LABOR RELATIONS BOARD HAS FOUND THAT WE HAVE VIOLATED THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, AND HAS ORDERED US TO POST AND ABIDE BY THIS NOTICE.

WE WILL NOT fail and refuse to bargain collectively with TEAMSTERS LOCAL 41 affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, by unilaterally subcontracting unit work and/or unit positions on a permanent basis, or otherwise unilaterally changing wages, hours and other terms and conditions of employment of employees in the following described appropriate unit, during a strike or otherwise, without providing prior notice and opportunity to bargain thereon to TEAMSTERS LOCAL 41. The appropriate unit for such collective-bargaining purposes is:

> All truck drivers and warehousemen employed by Land Air Delivery, Inc. at its delivery service located at Kansas City, Missouri, but Excluding independent contractors, office clerical employees, guards, and supervisors as defined in the Act.

WE WILL reinstate our pick-up and delivery service as previously performed by the above unit employees.
WE WILL NOT unlawfully refuse to reinstate employees who engage in a strike; and WE WILL offer the following named employees immediate and full reinstatement to their

former, or substantially equivalent positions without prejudice to their seniority or other rights and privileges; and WE WILL make them whole for any loss they may have suffered. The employees are:

Carleton, Mike	Harring, Ken	Stevens, Don (Ron)
Farris, John	Koehn, Jerry	Thomas, Dave
Guyton, Dale	Malinowski, Walt	Vest, Norman

WE WILL restore and place in effect, retroactive to 1 April 1985, all the wages, hours, rates of pay, and all other terms and conditions of employment of the above unit employees (excepting as may be allowed by law, union security, check-off, arbitration, and nonmandatory bargaining subjects) as provided by and established in the collective-bargaining agreement that terminated on 31 March 1985; and WE WILL maintain the same in effect until such time as we and TEAMSTERS LOCAL 41 shall have bargained in good faith to impasse, execute a new collective-bargaining agreement, or the Union refuses to bargain, or waives bargaining.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

LAND AIR DELIVERY, INC.

.....
(Employer)

Dated..... By.....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Tower II Building, Gateway Centre, Room 616, Fourth at State, Kansas City, Kansas 66101, Telephone 913-236-3866.

(3)

No. 88-1806

Supreme Court, U.S.
FILED
JUL 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

LAND AIR DELIVERY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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16 pp

QUESTIONS PRESENTED

1. Whether petitioner violated the National Labor Relations Act by permanently subcontracting all of the bargaining unit work during an economic strike, without notifying or bargaining with the Union.

2. Whether the Union's unfair labor practice charge under Section 8(a)(5) of the Act was barred by the six-month limitations period of Section 10(b).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	13

TABLE OF AUTHORITIES

Cases:

American Cyanamid Co., 235 N.L.R.B. 1316 (1978), enforced, 592 F.2d 356 (7th Cir. 1979) 10
Hawaii Meat Co. v. *NLRB*, 321 F.2d 397 (9th Cir. 1963) .. 11
NLRB v. *Erie Resistor Corp.*, 373 U.S. 221 (1963) 9
NLRB v. *Insurance Agents' International Union*, 361 U.S. 477 (1960) 11
NLRB v. *International Brotherhood of Electrical Workers*, 827 F.2d 530 (9th Cir. 1987) 12
NLRB v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938) 5, 9
Teamsters Local Union No. 42 v. *NLRB*, 825 F.2d 608 (1st Cir. 1987) 12

Statutes:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 8(a)(1), 29 U.S.C. 158(a)(1) 4, 5
§ 8(a)(3), 29 U.S.C. 158(a)(3) 4, 5, 6
§ 8(a)(5), 29 U.S.C. 158(a)(5) 5, 6, 8, 12
§ 10(b), 29 U.S.C. 160(b) 6, 8, 12

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LAND AIR DELIVERY, INC., PETITIONER

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NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14, 18) is reported at 862 F.2d 354. The decision and order of the National Labor Relations Board (Pet. App. 19-25), including the decision of the administrative law judge (Pet. App. 26-137), is reported at 286 N.L.R.B. No. 107.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 1988. A petition for rehearing was denied on March 2, 1989 (Pet. App. 15).[1] The petition for a writ of

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[1] On March 29, 1989, the court of appeals amended its December 2, 1988, judgment to grant the Board's cross-application for enforcement (Pet. App. 18).

certiorari was filed on May 8, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is an air freight motor carrier engaged in the pickup and delivery of small packages for overnight carriers (Pet. App. 2). On November 13, 1984, during the term of a collective bargaining agreement (effective from March 1, 1982, to March 31, 1985), Teamsters Local 41 (the Union) began a lawful strike to protest petitioner's failure to comply with certain grievance awards, as well as its refusal to take a deadlocked grievance to the next step of the grievance process (*id.* at 3, 21).[2] At the time of the strike, petitioner employed 13 bargaining unit drivers and utilized the services of additional independent contractor drivers (*id.* at 2, 40, 44-45).

To continue its operations during the strike, petitioner used a combination of employees from other locations, its pre-strike contractors, and eight replacement drivers that it hired during the first month of the strike. Three of the replacement employees were terminated in December 1984, however, and the remaining five were terminated on March 28, 1985. Between February 20 and March 1, 1985, petitioner signed agreements with 12 independent contractor drivers. Five of the contractors had not been contractors before the strike, and all 12 continued to perform work for petitioner after the strike ended. By hiring the

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[2] Some of the grievances involved alleged breaches of the subcontracting clause of the collective bargaining agreement. That clause, which prohibited subcontracting of work performed by bargaining unit employees, had been a major issue in the negotiations that culminated in the March 1, 1982 agreement. Indeed, petitioner had agreed to the subcontracting clause only after a three-day strike by its drivers. Pet. App. 2-3, 34-39.

subcontractors and terminating the replacement employees, petitioner effectively eliminated all of the bargaining unit positions by the end of March. Petitioner did not notify or bargain with the Union concerning its subcontracting decisions. Pet. App. 3, 21-22.

The strike lasted almost five months.[3] On April 9, 1985,[4] the 13 striking employees made an unconditional offer to return to work, but were advised that there was no work for them. None of the strikers was offered reinstatement. Pet. App. 4, 56.

On April 11, the Union filed an unfair labor practice charge, alleging that petitioner had unlawfully denied the former drivers reinstatement for engaging in an unfair labor practice strike (*i.e.*, a strike in response to an employer's unfair labor practice). On May 21, the National Labor Relations Board's Regional Director dismissed the charge, finding that the strike was an economic strike, entitling the employees to reinstatement only when positions became available. The Regional Director did not refer to petitioner's having permanently subcontracted all unit work. Pet. App. 4, 57-58.

The Union thereafter made several requests to petitioner for employment information. On June 3, it asked whether petitioner had hired any new employees since April 1, or whether any work previously performed by bargaining unit drivers had been subcontracted as of the date of the

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[3] The beginning of the strike was marked by violence against replacement workers and company property. Petitioner filed an unfair labor practice charge against the Union, and on February 4, 1985, the Union entered into an informal settlement agreement that contained a non-admission clause and a Notice to Employees and Members that it would not engage in any coercive acts or violence. There was no evidence of any union misconduct after February 4. Pet. App. 3-4, 45-46.

[4] All dates hereafter are in 1985, unless otherwise indicated.

inquiry. Petitioner's attorney, erroneously stating that the inquiry involved matters relating to a case currently pending before the Board, declined to respond to the Union's questions. Pet. App. 4, 58-59.[5] On June 22, the Union went back on strike. On July 16, the Union requested information about the employment status of each unit member, including the effective date of the employee's layoff or termination. Petitioner said that it would reply to that request by August 2, but it failed to do so. Pet. App. 4-5, 62.

On August 16, the Union again requested employment status information and asked whether independent contractors were performing bargaining unit work. Pet. App. 4-5, 62-67. Petitioner's attorney responded by letter, on August 22. He stated that, when it came to "putting a label" on the employment status of the unit members, "your guess is as good as mine." In response to the Union's question whether petitioner had subcontracted bargaining unit work, the letter stated that the company "has continued to conduct its business in the same manner and method as it did following the strike on November 13, 1984 [and that] no new contractors or employees have been added since April 9, 1985." Counsel's letter did not advise the Union that all unit work had been permanently subcontracted out prior to April 9. Pet. App. 5, 67-70.

On October 9, the Union filed a charge, alleging that petitioner had violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3), in part by "continu[ing] to allow independent contractors or sub-Independent contractors to continue to perform work of the bargaining unit once there was an unconditional offer to return to work." On February 20, 1986, the Union filed an amended

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[5] In fact, as noted above (p. 3, *supra*), the charge referred to by petitioner's counsel had been dismissed on May 21, and the period for filing an appeal had expired (Pet. App. 4 n.1, 59).

charge, alleging violations of Section 8(a)(1) and (3), and adding an allegation of violation of Section 8(a)(5), 29 U.S.C. 158(a)(5). The amended charge stated that on or about February 1, 1985, petitioner had "subcontracted out bargaining unit work without notice to or bargaining with the Union," and that on or about April 9, 1985, petitioner had "failed and refused to reinstate striking employees who had made an unconditional offer to return to work." Pet. App. 5. A complaint issued, incorporating both charges and alleging violations of Section 8(a)(1), (3), and (5) (C.A. App. 102-108).

2. The Board, affirming the administrative law judge, held that petitioner had violated Section 8(a)(5) and (1) of the Act by permanently subcontracting all unit work without notifying or bargaining with the Union, and had violated Section 8(a)(3) and (1) of the Act by refusing to reinstate nine of its striking employees after their unconditional offer to return to work (Pet. App. 19-25).[6] The Board rejected petitioner's contention that it was entitled to refuse to bargain over its subcontracting decision. It explained that "permanently contracting out the work of unit employees is not equivalent to replacement of one employee by another" (*id.* at 22), an act that is permissible under *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). The Board acknowledged that petitioner had the right to hire permanent employee replacements, or "to contract out the work temporarily for the duration of the strike" (Pet. App. 22-23). The Board held, however, that "unilateral permanent contracting out of the work[] is, absent proof that the options set forth above were unavail-

[6] The Board found that four of the 13 strikers were not entitled to reinstatement because of individual acts of misconduct during the strike (Pet. App. 22 n.6).

able to [petitioner], not permissible under the Act" (*id.* at 23).[7]

The Board also rejected petitioner's contention that the Section 8(a)(5) allegations of the complaint were barred by Section 10(b) of the Act, 29 U.S.C. 160(b).[8] Like the ALJ (see Pet. App. 98), the Board found that the Union did not have notice that petitioner had permanently subcontracted unit work until a date within the six-month period preceding the filing of the February 20, 1986 amended charge, which specifically alleged a violation of Section 8(a)(5) (Pet. App. 20 n.3). Alternatively, the Board found that "even if the Union was somehow on notice of the permanent nature of the subcontracting" at the time of the April 9, 1985, refusal to reinstate, the October 8, 1985 charge, although alleging only a violation of Section 8(a)(3) of the Act, "described the conduct complained of in terms sufficient to encompass the complaint allegations that [petitioner] had contracted out the bargaining unit work without prior notice to or bargaining with the Union." Thus, the Board concluded, "[t]he February 1986 amendment to the charge, elaborating on the legal theory, was * * * not an essential predicate for the complaint, as

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[7] The Board distinguished permanent subcontracting from "non-permanent, stopgap, or temporary measures entered into by an employer to continue service during a strike." It explained that an employer is under no duty to bargain over "temporary subcontracting necessitated by a strike where such subcontracting does not transcend reasonable measures necessary to maintain operations in strike circumstances." And it stated that "[t]he appropriate temporary character may exist even if the subcontract period extends beyond the strike, provided the subcontracts when entered are only of such duration as is dictated by the exigencies of the strike, or because of the threat of imminent strike." Pet. App. 23-24 n.8.

[8] Section 10(b) provides that no complaint shall issue based on any unfair labor practice that occurred more than six months prior to the filing of a charge with the Board.

the October 1985 charge sufficiently identified the conduct in question to accord due process and fulfill the function of a charge under the Act's procedural scheme." *Ibid.*

The Board ordered petitioner to reinstate the pickup and delivery service previously performed by bargaining unit employees; to offer reinstatement to and make whole the strikers not found to have forfeited reinstatement; to bargain with the Union about the terms of a new agreement; and to restore the terms and conditions of employment provided by the expired collective bargaining agreement, retroactively to April 1, 1985, and until the reaching of a new agreement or impasse, or until the Union waived further bargaining. Pet. App. 25, 134-137.

3. The court of appeals enforced the Board's order (Pet. App. 1-14, 18). The court recognized that under *Mackay,* "an employer faced with an economic strike is entitled to replace strikers permanently with new employees" (*id.* at 7), but held that this rule does not permit the employer to replace strikers with permanent subcontractors. The court noted that "[a] permanent subcontract diminishes the bargaining unit by the scope of the subcontract" (*ibid.*). Moreover, the court stated, "[c]ontracting out all bargaining unit work, as occurred in this case, completely destroys the bargaining unit" (*ibid.*).[9]

[9] The court added (Pet. App. 7-8):

> Although as a practical matter it may be true that total replacement of strikers by new permanent employees will often result in a decertification of the union, there is a legal difference between the employer unilaterally dissolving the unit by contracting out its work and the employees in the unit themselves decertifying the union. Until decertification, the employer is obliged to bargain with the striking union over all terms and conditions of employment in the bargaining unit, and his obligation would be lessened if a portion of the work of the unit were permanently subcontracted. Bringing on permanent replacements, moreover, does not necessarily lead to the extinction of the bargaining unit.

Here, the court found, petitioner's permanent subcontracting decision was not motivated by business necessity. The court observed that the subcontracting had taken place more than three months after the strike began, that petitioner had successfully operated during those months without adding to its pre-strike contractors, and that there was no evidence that petitioner had been unable to continue its operations without additional subcontracting (*id.* at 10-12). In short, the court concluded, petitioner's "decision to subcontract all of its driving work during the union's ineffective strike hardly looks motivated by business necessity. Rather, it appears that petitioner seized the opportunity it thought legally available to fashion a final solution to the dispute over the use of independent contractors." *Id.* at 11.

Finally, the court agreed with the Board that the complaint was not barred by Section 10(b). The court explained that "although the alleged violation of section 8(a)(5) took place more than six months before the filing of the amended complaint on February 20, 1986, the union did not have notice of the permanent subcontracting of unit work until a date within the six month period preceding February 20" (Pet. App. 13).[10] Alternatively, the court agreed with the Board that the October 8, 1985 charge, describing the conduct alleged in the Section 8(a)(5) portions of the complaint, was sufficient to support all of the complaint allegations, even though the charge had not expressly relied on Section 8(a)(5) (*id.* at 13-14).

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[10] The court observed that although the Union had accused petitioner in August 1986 of unilaterally subcontracting unit work, petitioner's response, which stated that it had "continued to conduct business as it formerly did prior to the strike," could reasonably have been construed by the Union as a denial (Pet. App. 13).

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. In *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), this Court held that it is not an unfair labor practice for a struck employer, "in an effort to carry on the business," to hire other employees to fill the places of strikers and to make and honor a commitment that the new employees will not be discharged at the end of the strike (*id.* at 345-346). As the Court explained in *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963), however, not every measure taken by an employer to maintain its operations during a strike is permissible under the Act. Thus, in *Erie Resistor*, the Court held that an employer may not grant superseniority to replacement employees or to employees who abandon a strike, even if the employer believes that such offers are necessary to continue the employer's business. The Court accepted as reasonable the Board's conclusion that superseniority, unlike the permanent replacement permitted in *Mackay*, has such a devastating effect on employees, both during and after a strike, that the employer's business interest in providing superseniority does not "outweigh the damage to concerted activities" (373 U.S. at 232). More generally, the Court explained that where "[t]he ultimate problem is the balancing of the conflicting legitimate interests," the "function of striking that balance * * * is often a difficult and delicate responsibility which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review" (373 U.S. at 236 (citation omitted)).

In the present case, the court of appeals applied those principles and correctly held that the Board had struck a

reasonable balance between the employees' right to strike and the employer's right to continue its operations. The court concluded that, at least absent a business necessity, an employer may not permanently subcontract unit work during a strike without first notifying and bargaining with the employees' union representative about that proposed action.

Petitioner contends (Pet. 14-15) that the Board's decision is "flawed" because, in petitioner's view, "permanent replacement with contractors" is no more "destructive of a bargaining unit than permanent replacement with employees." As the Board has previously explained, however, an employee who permanently replaces a striker "becomes a part of the unit represented by the Union"; "the composition of the unit remains the same"; and "working conditions are not changed." *American Cyanamid Co.*, 235 N.L.R.B. 1316, 1323 (1978), enforced, 592 F.2d 356 (7th Cir. 1979). By contrast, permanent subcontracting "remove[s] [the affected] jobs from the unit," at least until and unless the subcontractors abandon their contractual relationship. *American Cyanamid*, 235 N.L.R.B. at 1323. Permanent subcontracting also unilaterally "change[s] * * * the terms and conditions of employment concerning which an employer must bargain" and effectively "destroy[s] the bargaining unit" (*ibid.*).[11] As the court of appeals added (Pet. App. 7), while "total replacement of strikers by new permanent employees will often result in a decertification of the union," until "decertification, the employer is obliged to bargain with the striking union over all terms and conditions of employment in the bargaining

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[11] In 1975, the Board clarified the Union's certification specifically to exclude independent contractors from the bargaining unit (Pet. App. 30-31). Thus, the independent contractors retained by petitioner in this case had been expressly excluded from the bargaining unit.

unit, and his obligation would be lessened if a portion of the work of the unit were permanently subcontracted." Moreover, the court noted (*id.* at 7-8), "[b]ringing on permanent replacements * * * does not necessarily lead to the extinction of the bargaining unit," because "[a] striking union might be able to gain the allegiance of at least some of the replacement employees who, combined with strikers, could provide the union with continued majority support."[12]

The Ninth Circuit's decision in *Hawaii Meat Co.* v. *NLRB*, 321 F.2d 397 (1963), does not hold to the contrary. As the court below correctly observed, *Hawaii Meat* "was carefully drawn to deal with the exigencies of the particular situation presented, and to exclude from the decision's compass cases like the instant one" (Pet. App. 9). In *Hawaii Meat*, the employer decided prior to the strike to subcontract its hauling operations permanently in the event of a strike, and it notified the union of its plans in advance. The employer's purpose in subcontracting was clearly defensive—to keep its plant operating during the strike (321 F.2d at 399). In the present case, by contrast, the subcontracting took place more than three months after the strike started, and petitioner had successfully operated throughout that period without additional per-

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[12] Petitioner's reliance (Pet. 16, 18-19) on *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477 (1960), is misplaced. In that case, the Court held that assessing the parties' good or bad faith at the bargaining table on the basis of the economic weapons they used amounted to "the Board's entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced" (*id.* at 498). Here, however, the Board did not assess the parties' good or bad faith in bargaining negotiations; rather, it determined that petitioner took action that impermissibly burdened the right to strike. That issue is one that Congress has given the Board authority to resolve.

manent subcontracting. In these circumstances, as the court below concluded, "[t]here is no reason to believe that negotiation with the union over [the] issue [of subcontracting] was any more inappropriate or anomalous in March 1985 than it had been in previous years" (Pet. App. 11).

2. There is no merit to petitioner's contention (Pet. 22-29) that it was denied due process by the Board's rejection of its Section 10(b) defense to the alleged violation of Section 8(a)(5). Contrary to petitioner's assertion (Pet. 28) that a "finding of fraudulent concealment * * * was obviously a critical factor" in the conclusion that the February 1986 charge was timely, neither the Board nor the court of appeals relied on that consideration. See Pet. App. 13, 20 n.3. Rather, the Board found, and the court of appeals agreed, that the Union did not have notice of the subcontracting until a date within the six-month period preceding the filing of the February 1986 charge; thus, the case is governed by the settled rule that the statutory limitations period does not begin to run until the party filing the charge knows or has reason to know that an unfair labor practice has occurred. See *NLRB* v. *International Brotherhood of Electrical Workers*, 827 F.2d 530, 533 (9th Cir. 1987); *Teamsters Local Union No. 42* v. *NLRB*, 825 F.2d 608, 614 (1st Cir. 1987).

In any event, the Board had an alternative basis for rejecting petitioner's Section 10(b) defense: it concluded that the factual allegations of the timely October 1985 charge were sufficient to afford petitioner fair notice of the conduct in question and to satisfy the requirements of Section 10(b) with respect to *all* the allegations of the amended charge (Pet. 20 n.3). Petitioner does not challenge that alternative determination, and the court of appeals correctly upheld the decision on that basis as well (Pet. App. 12-13).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1989

* The Solicitor General is disqualified in this case.

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No. 88-1806

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

LAND AIR DELIVERY, INC. - - - Petitioner

versus

NATIONAL LABOR RELATIONS BOARD - Respondent

PETITIONER'S REPLY ON APPLICATION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

PAGE

Table of Authorities i

Argument 1–6

I. First Issue 1–5

II. Second Issue 5–6

TABLE OF AUTHORITIES

Cases:

PAGE

Buckley Broadcasting Corporation of California, 284 NLRB No. 113 (1987) 4

Fibreboard Corp. v. *NLRB*, 379 U.S. 203 (1964) ...1, 2, 3

Hawaii Meat Company v. *NLRB*, 321 F. 2d 397 (9th Cir. 1963) 4, 5

NLRB v. *Curtin Matheson Scientific, Inc.*, 859 F. 2d 362 (5th Cir. 1988), *cert. granted* — U.S. —, 57 U.S.L.W. 3835 (1989) 4

NLRB v. *Erie Resistor Co.*, 373 U.S. 203 (1964) ...1, 2, 3

NLRB v. *Insurance Agents' International Union*, 361 U.S. 477 (1960) 3

NLRB v. *Mackay Radio & T. Co.*, 304 U.S. 333 (1938) 2

TWA v. *Independent Fed. of Flight Attendants*, — U.S. —, 103 L. Ed. 2d 456 (1989) 2–3

Statutes:

National Labor Relations Act, 29 U.S.C. §§ 151 et seq.:

Section 8(a)(3), 29 U.S.C. § 158(a)(3) 1, 2, 3

Section 8(a)(5), 29 U.S.C. §158(a)(5) 2, 3

Section 10(b), 29 U.S.C. § 160(b) 5

See, Rule 28.1 List, Pet. II

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ARGUMENT

I. FIRST ISSUE

1. In contending that review by this Court is "unwarranted" the respondent abandons the basis of the decisions below and offers a new theory, one not heretofore argued by respondent or relied upon by any tribunal in this matter. The respondent's new theory is that use of contractor replacements is tantamount to the "devastating effect" (Brief in Opp. 9) caused by granting superseniority to replacement employees. For this theory, respondent relies on *NLRB* v. *Erie Resistor Co.,* 373 U.S. 221 (1963), a section 8(a)(3) case not mentioned heretofore by the ALJ, the Board, the court below, or by any party in this matter.

Respondent's argument on Question 1 makes no reference to *Fibreboard Corp.* v. *NLRB,* 379 U.S. 203

(1964), or to Section 8(a)(5); yet those were the bases of the decisions below that (as characterized by the D.C. Circuit) *NLRB* v. *Mackay Radio & T. Co.*, 304 U.S. 333 (1938), does not "trump" *Fibreboard*, and that Section 8(a)(5) governs this case. The D.C. Circuit was express in stating that the Section 8(a)(5) violation was the foundation for the Section 8(a)(3) violation.[1] See Pet. App. 12 n. 8.

Erie Resistor is one of the direct descendants of *Mackay* and is a Section 8(a)(3) decision.[2] The holding in *Erie Resistor* concerned "superseniority" for strike replacements and crossovers, and offers no support for the decisions below.[3] Furthermore, this Court has recently rejected an effort to "expand *Erie Resistor*." *TWA* v. *Independent Fed. of Flight Attendants*,

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[1]Respondent displays manifold incongruity regarding the Section 8(a)(5) bargaining claim. First, despite abandoning reliance on Section 8(a)(5) to support the decisions below, respondent recites evidence relevant only to bargaining issues: correspondence exchanged from June 3 to August 22, 1985, after the strike ended. Brief in Opp. 3-4. Second, this evidence is not probative because it concerns events which occurred well after the dates on which the Section 8(a)(5) violation was expressly alleged to have taken place, i.e., February 1 to March 1, 1985. Pet. App. 3-4, 21-22, 26-27, 96-97. Petitioner was never accused of refusing to bargain after the strike ended.

[2]The Court in *Erie Resistor* noted that the Board had found a Section 8(a)(5) violation (375 U.S. at 226 n. 5) but addressed the case only as one of alleged discrimination under Section 8(a)(3).

[3]Although now relying on the Section 8(a)(3) holding in *Erie Resistor*, the respondent rephrased petitioner's Question 1 to read solely in terms of Section 8(a)(5) and bargaining, stating it as whether it was unlawful to use permanent contractor strike replacements "without notifying or bargaining with the union." Brief in Opp. I. But bargaining and Section 8(a)(5) were not in issue in *Erie Resistor*.

—— U.S. ——, 103 L.Ed. 2d 456, 467 (1989). *Erie Resistor* would have to be strained to apply here.[4]

By abandoning *Fibreboard* at this stage of the proceedings and relying for the first time on the previously unreferenced *Erie Resistor,* respondent is either: (1) conceding that *Fibreboard,* a non-strike Section 8(a)(5) case, is not applicable to this case, as petitioner has argued throughout; or (2) attempting to minimize the tensions between *Mackay* and *Fibreboard* in an effort to downplay the significance of the issue presented.

However, respondent's belated change of direction in relying on *Erie Resistor* highlights the confusion under which the National Labor Relations Board is laboring on this issue of the propriety of replacing strikers with contractors. Even the Board is uncertain as to why use of contractor replacements is not the equivalent of using employee replacements. Clarification of this important matter is called for.

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[4]Respondent challenges (Brief in Opp. 11 n. 12) petitioner's reliance on *NLRB v. Insurance Agents' International Union,* 361 U.S. 477 (1960), for the proposition that use of economic weapons in response to a strike is not a bargaining (Section 8(a)(5)) issue. Respondent argues that the Board did not address this case as an assessment of "good or bad faith in bargaining negotiations" (Section 8(a)(5)) but rather as an impermissible burdening of the right to strike (Section 8(a)(3)). To the contrary, the Board expressly addressed this case as governed by Section 8(a)(5) and bargaining:

> Thus, we agree with the judge [ALJ] that [Land Air's] permanent contracting out the work previously performed by bargaining unit employees without notifying or bargaining with the Union constituted an unfair labor practice, even though done in the course of a strike.

Pet. App. 23-24. The Board's analysis contravened *Insurance Agents.*

2. Respondent asserts as a matter beyond dispute that contracting "destroys" the bargaining unit. We have suggested this is not so. Pet. 14-15.

On June 26, 1989, this Court granted certiorari in *NLRB* v. *Curtin Matheson Scientific, Inc.*, —— U.S. ——, 57 U.S.L.W. 3835 (1989) to address whether there should be any presumption as to union support by employee replacements. If the answer is that replacements should be presumed not to support the union, then petitioner's use of contractor replacements will have had a less destructive effect on the bargaining unit because it did not inject non-supporters into the unit. Employee replacements can vote the unit out of existence by decertifying the union; contractor replacements cannot. The "presumption" that contracting destroys the unit is no more valid than the presumption of union support by employee replacements, which presumption the Board itself has rejected in *Buckley Broadcasting Corporation of California*, 284 NLRB No. 113 (1987). See Pet. 14-15.

3. The respondent argues that there is no inconsistency among the circuits because the decision in *Hawaii Meat Company* v. *NLRB*, 321 F. 2d 397 (1963) was "narrowly drawn" in a manner excluding application to this case. Respondent notes that the employer in *Hawaii Meat* notified the union in advance of its plan to contract out the struck work. But even the Board, as quoted in *Hawaii Meat*, stated there was no requirement to give prior notice of such contracting before a strike:

> The Board also said: "We are not holding that before the strike ensues, an employer must reveal

> his intention to replace strikers on an individual basis, nor do we imply that an employer must advise the union in advance of the strike of his plans to counteract the impact of the strike."

321 F. 2d at 398

Respondent also attempts to distinguish *Hawaii Meat* because the contracting there began simultaneously with the strike, whereas here the additional contractors were not used until some three months into the strike.[5] If, as we have contended and as the Ninth Circuit held in *Hawaii Meat,* use of contractor replacements is the equivalent of using employee replacements, then the timing of the utilization is without significance. The question we ask this Court to address is whether that equivalence exists.

II. SECOND ISSUE

Respondent does not deny that a finding of fraudulent concealment by petitioner was made without notice and an opportunity to litigate as required by Due Process. Rather, despite the fact that both the ALJ and the D.C. Circuit considered it necessary to refer to fraudulent concealment in their respective decisions (Pet. App. 13, 98), respondent states that that finding was not relied on and that there were alternative grounds to reject the Section 10(b) defense.

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[5]In fact, as respondent acknowledges (Brief in Opp. 2, 10), not only had petitioner been using contractor drivers at all times during the strike (and indeed since before 1975), but the strike itself was motivated in part by the dispute over the use of subcontractor drivers. Thus, there was no sudden unprecedented changeover to contractor drivers.

Contrary to respondent's assertion, petitioner has preserved its challenge to those alternative grounds in Question 3 (although not suggesting that the alternative grounds are alone sufficient to raise an issue warranting review by this Court). The Due Process question would be determinative if petitioner's challenge to the alternative grounds is sustained.

Respectfully submitted,

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